

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF NEW YORK

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4 JAMES W. McCULLEY,

5 Plaintiff,

6 -versus-

05-CV-811

7 (EVIDENTIARY HEARING Cont'd)

8 NYS DEPARTMENT OF ENVIRONMENTAL

9 CONSERVATION, et al.,

10 Defendants.

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15 TRANSCRIPT OF PROCEEDINGS held in and for the

16 United States District Court, Northern District of New York,

17 at the James T. Foley United States Courthouse, 445 Broadway,

18 Albany, New York 12207, on FRIDAY, FEBRUARY 3, 2006, before

19 the HON. DAVID R. HOMER, United States District Court

20 Magistrate Judge.

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2 APPEARANCES:

3 FOR THE PLAINTIFF:

4 SMITH, DWYER LAW FIRM

5 BY: MATTHEW D. NORFOLK, ESQ.

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8 FOR THE DEFENDANTS:

9 HON. ELIOT SPITZER, New York State Attorney General

10 BY: DAVID A. MUNRO, Assistant Attorney General

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2 I N D E X T O W I T N E S S E S :

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4 PLAINTIFFS: DIRECT CROSS REDIRECT RECROSS

5 BRUCE B. REED 254 268 269 ---

6 KENNETH C. JUBIN 272 299 --- ---

7 JOSEPH J. LaPIERRE 305 332 340 ---

8 CHRISTOPHER A. LACOMBE 345 371 396 ---

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11 DEFENDANTS:

12 KENNETH R. HAMM 419 431 --- ---

13 ROBERT K. DAVIES 442 454 --- ---

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13 DEFENDANTS:

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1 (Court commenced at 9:04 AM.)

2 THE CLERK: The date is February 3, 2006.

3 The time is 9:00 AM. The matter is James A. McCulley versus
4 New York State Department of Environmental Conservation, et
5 al., docket 05-CV-811. Can we have appearances, please?

6 MR. NORFOLK: Good morning. Before I call my
7 first witness, Judge --

8 THE COURT: Have to have your appearance,
9 first, please.

10 MR. NORFOLK: Okay. I'm sorry, I apologize.
11 Plaintiff's attorney Matthew Norfolk, with, to my right,
12 James W. McCulley.

13 MR. MUNRO: David Munro, Assistant Attorney
14 General, for the defendants.

15 THE COURT: I'm sorry, Mr. Norfolk, you
16 wanted to say something?

17 MR. NORFOLK: Oh, just again, before I call
18 my first witness, if there's any witnesses in the courtroom,
19 I'd ask them -- I'd ask the Court to ask them to be removed.

20 THE COURT: Mr. Munro, anybody here?

21 MR. MUNRO: Yeah. Stuart Buchanan is in the
22 back, he is a named defendant, he is the Regional Director
23 for the DEC office up in Raybrook.

24 MR. NORFOLK: Okay.

25 THE COURT: Call your next witness, please.

1 MR. NORFOLK: Mr. Bruce Reed.

2 (Pause in proceedings.)

3 THE CLERK: Mr. Reed, if you'll step right up
4 here, as best as you can with the obstacles. It's Bruce?

5 THE WITNESS: Yes.

6 THE CLERK: And your middle initial?

7 THE WITNESS: B.

8 THE CLERK: And it's Reed?

9 THE WITNESS: Reed, R-E-E-D.

10 THE CLERK: Raise your right hand.

11 (Witness duly sworn.)

12 THE CLERK: Bruce B. Reed, R-E-E-D.

13 THE COURT: Good morning.

14 THE WITNESS: Good morning.

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1 B R U C E B. R E E D,

2 having been called as a witness, being duly sworn,

3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. NORFOLK:

6 Q. Good morning, Mr. Reed.

7 A. Hi.

8 Q. I am gonna ask you a few questions about your
9 experiences as a Town Supervisor -- Town -- Superintendent
10 for Highways for the Town of Keene. How long have you held
11 that position?

12 A. Eleven years.

13 Q. Before becoming a highway superintendent, did you
14 work for the Town of Keene in any other capacity?

15 A. Yes. I was employed with the highway department.

16 Q. And did you have a title before being a
17 superintendent?

18 A. HEO, heavy equipment operator.

19 Q. And what were the duties and responsibilities as a
20 heavy equipment operator for the Town of Keene?

21 A. I run the grader and bulldozer. Reconstructing
22 roads, maintainin' the roads.

23 Q. And it's in your capacity as a heavy operator --
24 heavy equipment operator, you work mainly on roads and
25 highways or do you work on other parts of the town?

1 A. Other parts (unintelligible.) Well, we worked in
2 parks, the trails, whatever needed to be done.

3 Q. How long were you an HEO?

4 A. I started in 1980, and in '94, I took over as
5 highway superintendent, so...

6 Q. Okay. Are you familiar with the Old Mountain
7 Road?

8 A. Yes, I am.

9 Q. Is the Old Mountain Road a road in the Town of
10 Keene?

11 A. Yes.

12 Q. Could you describe to the Court, as best you can,
13 geographically where the Old Mountain Road is in the Town of
14 Keene, where it maybe begins and ends?

15 A. Begins now at the end of Alstead Hill Road.

16 Q. Okay. And where does it travel to?

17 A. In the Lake Placid region.

18 THE COURT: I'm sorry, can you spell -- is it
19 Elster?

20 THE WITNESS: Alstead Hill, A L S T E A D.

21 THE COURT: Alstead Hill Road, okay. Thank
22 you.

23 BY MR. NORFOLK:

24 Q. You say it travels to Lake Placid?

25 A. Yes, far as I know.

1 Q. Does the part that's in the Town of Keene,
2 where -- of the Old Mountain Road, where does it end?

3 A. Where does it end? I can't simply pinpoint it,
4 but it's on the other side of Chimney Hill.

5 Q. How about this? Does the part of Old Mountain
6 Road that's in Keene, does that go to the North Elba town
7 border?

8 A. Yes.

9 Q. Okay. And then from there, the Old Mountain Road
10 continues in the Town of North Elba?

11 A. Into the state road, Route 73.

12 Q. Okay. Okay. That's the (unintelligible.)

13 In your capacity as an HEO, heavy equipment
14 operator, have you ever done maintenance work yourself on
15 the Old Mountain Road in Keene?

16 A. Yes.

17 Q. And when I ask these questions about the Old
18 Mountain Road, I'm obviously referrin' to that part of the
19 road in Keene. I know it makes no sense to you because you
20 work in North Elba, correct?

21 A. Correct.

22 Q. As an HEO, can you tell me what type of work you
23 did on the Old Mountain Road?

24 A. Cut trees, cut brush, rotted culverts. We built a
25 bridge.

1 Q. Now, as an HEO, can you give me -- was it once --
2 one time one year or is it many times several years? How
3 did the work go?

4 A. Many times.

5 Q. Okay. When do you recall first doing the
6 maintenance on the Old Mountain Road?

7 A. I believe it was in 1985.

8 Q. Okay. And that was you personally --

9 A. Yes.

10 Q. -- that did that? Now, was that in your capacity
11 as an HEO?

12 A. Yes.

13 Q. For the Town of Keene?

14 A. Yes.

15 Q. Did you have fellow employees there?

16 A. Yes.

17 Q. Did it range one or two or 10, 20? How was that?

18 A. Full squad. Six or seven, I believe, at the time.

19 Q. And that would be every time you did do work on
20 the Old Mountain Road, talkin' about in the '80s, you'd have
21 typically a squad with you doin' the work?

22 A. Yes.

23 Q. Did you bring bulldozers down on the Old Mountain
24 Road at that time?

25 A. No.

1 Q. Okay. How did you get back in there?

2 A. With a weapons carrier, an old Army weapons
3 carrier we had.

4 Q. Can you explain to the Court what a weapons
5 carrier is?

6 A. Well, it's old Army surplus vehicle that we
7 purchased through the Federal Government.

8 Q. Like a big four by four?

9 A. Yeah.

10 Q. Jeep like?

11 A. Yep.

12 Q. Big knobby tires?

13 A. Yes.

14 (Pause in proceedings.)

15 Q. You mentioned culverts that you have put -- you
16 had put in in the '80s? Can you tell me what the
17 materials -- what the culverts were made of, what type of
18 material?

19 A. Galvanized steel.

20 Q. Okay. Galvanized steel.

21 MR. NORFOLK: I'd like to -- excuse me a
22 minute, Mr. Reed. I have here Plaintiff's Exhibit 94, 93
23 and 122, which is Number 35 on your exhibits list.

24 Do you have any objection to having
25 these in?

1 MR. MUNRO: Well, he is gonna tell us what
2 they are and what the dates are, right?

3 MR. NORFOLK: I'm gonna ask him about this
4 one, okay.

5 MR. MUNRO: I won't object to anything he can
6 describe.

7 MR. NORFOLK: Okay. All right. May I
8 approach the witness?

9 THE COURT: Yes.

10 BY MR. NORFOLK:

11 Q. I'm gonna give you Plaintiff's Exhibit 93 --

12 THE COURT: Which is?

13 Q. -- which is a --

14 THE COURT: Which is what number?

15 MR. NORFOLK: 35, I believe.

16 THE COURT: 93, okay.

17 MR. NORFOLK: 35 on the exhibits list.

18 THE COURT: Okay.

19 BY MR. NORFOLK:

20 Q. Ask you to look at that. Can you tell me what the
21 Plaintiff's Exhibit 93 is, appears to be?

22 A. It appears to be a culvert underneath a road.

23 Q. Okay. Does it appear to be a photo, a copy of a
24 photo, a printout?

25 A. Yes.

1 Q. Okay. Does that fairly and accurately depict a
2 picture of a culvert on the Old Mountain Road?

3 MR. MUNRO: Objection. Can we get a time
4 period here?

5 MR. NORFOLK: Actually that was gonna be my
6 next question, but --

7 Q. In 2003, does that fairly and accurately depict a
8 culvert on the Old Mountain Road?

9 A. 2003?

10 Q. In the summer of 2003.

11 A. Could be. I'd -- I haven't been up there since
12 2003, but I know we put culverts in.

13 Q. Does that appear to you to be a photograph -- true
14 and accurate picture of a culvert that was provided by the
15 Town of Keene?

16 A. Yes.

17 MR. NORFOLK: I ask that be admitted into
18 evidence.

19 MR. MUNRO: Objection, your Honor. I don't
20 know who took this photo.

21 A. I believe --

22 THE COURT: Hold on. Not talkin' to you.

23 THE WITNESS: All right.

24 THE COURT: Sustained. No foundation.

25 BY MR. NORFOLK:

1 Q. Now, in -- let's move to the '90s. Were you still
2 an HEO?

3 A. Yes.

4 Q. Okay. Did you, in the course of your employment
5 as HEO, do any maintenance work on the Old Mountain Road in
6 Keene?

7 A. Yes.

8 Q. Can you -- when? When did you do it?

9 A. In the 1990s. '91.

10 Q. Okay. Any in '92?

11 A. Possibly, yes.

12 Q. Okay.

13 A. There was a time period that we done work a little
14 bit each time.

15 Q. Each year in the '90s?

16 A. Yeah, '91, '92, I would say.

17 Q. Okay. Can you give the Court a brief summary of
18 what kind of work you would do in the '90s on the Old
19 Mountain Road?

20 A. Yeah, we'd cut brush, and I think we also did
21 bridge work at that same location.

22 Q. What kind of bridge work?

23 A. Well, replacement of planks.

24 Q. Planks?

25 A. Yeah. The bridge settled, so we would jack it up,

1 put stuff underneath it.

2 Q. What kind of bridge was this?

3 A. It was a wooden deck with steel beams underneath.

4 Q. Steel beams?

5 A. I believe so.

6 Q. Okay. When you say cut brush, did you cut brush
7 with tweezers -- not tweezers, not tweezers, but with
8 clippers or something else?

9 A. Chain saw.

10 Q. Chain saw. Okay. Did you have to cut any trees
11 down?

12 A. Yes.

13 Q. And how about remove any rocks or boulders that
14 may have gotten in the way, do you recall?

15 A. Not at that time.

16 Q. Okay. When did -- what year did you become the
17 highway superintendent?

18 A. '94.

19 Q. '94. Okay. Let's go to '94. As highway
20 superintendent, do you recall doin' any work on the Old
21 Mountain Road?

22 A. No.

23 Q. Okay. How about '95?

24 A. No.

25 Q. '96, did you do some work?

1 A. Yes, I did.

2 Q. Okay. Could you explain -- when in '96, if you
3 know?

4 A. November 3rd.

5 Q. You remember that. Now, how is it that you
6 remember that?

7 A. Because I have it in my daily minder.

8 Q. My daily reminder. Okay. Well, let's try to go
9 on your own memory, and if there is a need for that, perhaps
10 we can have you refer to it, okay? Let's try to go on your
11 own recollection.

12 November 3, '96?

13 A. I believe so.

14 Q. Okay. What did you do on November 3, '96?

15 A. I brought one of my workers up with me, we hauled
16 up a bulldozer on a trailer and we brought chain saws up and
17 my worker cut brush, 'cause I was on the bulldozer repairin'
18 the road.

19 Q. Okay. You hauled a bulldozer up on a trailer?

20 A. Yes.

21 Q. What was towing the trailer?

22 A. Dump truck.

23 Q. Can you give us the size of the dump truck? Was
24 it -- not well-versed in that, two ton, three ton, the size
25 of it?

1 A. Over eighty-two thousand pounds.

2 Q. Dump truck?

3 A. Yes.

4 Q. How many wheels does the dump truck have on it?

5 A. Six.

6 Q. So that's four on a rear axle --

7 A. Yes.

8 Q. -- and two?

9 A. Right.

10 Q. Okay. Now, the bulldozer, what kind of bulldozer
11 was it?

12 A. John Deere 450.

13 Q. And you cleared, what did you say, you cleared
14 trees and shrubs, or what did you do?

15 A. Durin' the floods of '96, '95 and '96, there was
16 those floods, I went up and it was all gutted out, and went
17 up and repaired it.

18 Q. Okay. Do you recall bein' at a meeting, a town
19 board meeting, I think it was, in 2000 -- June of 2005 where
20 a discussion of the Old Mountain Road and whether it should
21 be abandoned or closed came up?

22 A. Yes.

23 Q. Okay. Do you recall when that was in June?

24 A. Not right offhand. It would have to be the second
25 Tuesday of the month.

1 Q. All right. I think that was June 14th, that --
2 all right.

3 So the topic of the Old Mountain Road and
4 whether it should be closed or abandoned came up at this
5 town meeting, correct?

6 A. Correct.

7 Q. Can you tell me if there's any resolutions passed
8 for closing or abandoning or qualifying abandoning the Old
9 Mountain Road in the Town of Keene?

10 A. There was a resolution.

11 Q. And can you tell me what the resolution was?

12 A. Qualified abandonment.

13 Q. It was -- the Town Board agreed to qualify
14 abandoned the Old Mountain Road in the Town of Keene?

15 A. Yes.

16 Q. Now, this was in June of 2005?

17 A. Correct.

18 Q. Not even a year ago, correct?

19 A. Correct.

20 Q. Okay.

21 MR. NORFOLK: I'm going to offer in
22 evidence -- I would like to present Exhibit 73, which is
23 Number 9 on the Plaintiff's Exhibit list.

24 (Pause in proceedings.)

25 THE COURT: Has that been offered in

1 evidence?

2 MR. NORFOLK: I am gonna offer it. I don't
3 know if there's an objection or you want me to lay a
4 foundation or whatever.

5 THE COURT: Any objection?

6 MR. MUNRO: No objection, your Honor.

7 MR. NORFOLK: All right.

8 THE COURT: Plaintiff's Exhibit 73 is
9 received in evidence.

10 (Plaintiff's Exhibit 73 received.)

11 BY MR. NORFOLK:

12 Q. Mr. Reed, I am gonna give you what's exhibit --
13 marked as Plaintiff's Exhibit 73. Can you take your time
14 and take a look at it? Flip through it and then I want to
15 ask you a few questions.

16 A. (Witness complies.)

17 THE COURT: You recognize that as the
18 minutes, Mr. Reed?

19 THE WITNESS: Yes.

20 THE COURT: Do you want to direct his
21 attention to a particular section?

22 MR. NORFOLK: Yes, I do.

23 BY MR. NORFOLK:

24 Q. Are -- yes, I do. I want to direct you to -- it's
25 on -- marked as page 0049 of Plaintiff's Exhibit 73. At the

1 bottom here, it says resolution number 142-05. Can I ask
2 you to read that outloud and then I'm gonna follow up with a
3 question?

4 A. "The Board adopted resolution number 142-05. The
5 resolution is (unintelligible.)

6 Q. Okay. Now, --

7 MR. MUNRO: Your Honor, he's already
8 testified to that, even before reading from the document.
9 We have even stipulated to the admissibility of the
10 document, just to move this along here.

11 MR. NORFOLK: Judge, if I may? The next part
12 I want him to read is -- it's one sentence, I am gonna
13 follow up a question on it.

14 Q. Right here.

15 A. (Unintelligible.) Said yes.

16 Q. Okay. My question to you is: Did the Town Board
17 ask for your permission as the highway superintendent to go
18 along with this qualified abandonment resolution?

19 A. Yes.

20 Q. And why was that? Why did they ask you for your
21 permission or acceptance of going along with this qualified
22 abandonment?

23 A. Because I have to make the -- the resolution is to
24 be made by the Town Board to close the road, but I'm the one
25 that they -- I'm the one that closes the road or --

1 Q. And did they ask you to confirm that you would
2 not do anymore maintenance on the Old Mountain Road for the
3 Town of Keene?

4 A. Yes.

5 Q. Okay. As highway superintendent, what is your
6 understanding, after having this meeting, what qualified
7 abandonment meant for the Town of Keene with respect to the
8 Old Mountain Road?

9 A. I feel that that's -- that we don't do anymore
10 work on it but we still own it.

11 Q. Okay. You're a highway superintendent. You have
12 been there 10 years, did you say?

13 A. Eleven.

14 Q. Eleven years. Can a town close a road that
15 doesn't have ownership of -- it doesn't have ownership of?

16 A. No.

17 Q. Right.

18 MR. NORFOLK: No more further questions. I
19 reserve to redirect. Thank you, Mr. Reed.

20 THE COURT: Mr. Munro, any questions?

21 MR. MUNRO: Just a few questions, your Honor.

22 CROSS-EXAMINATION

23 BY MR. MUNRO:

24 Q. Mr. Reed, I am gonna ask you a few questions about
25 the Old Mountain Road, and let me define it so we're both

1 talking about the same thing. I'm talking about the road
2 that runs from North Elba, okay, not the nine-tenths of the
3 road that is paved, but where the paving ends and there's a
4 turn-around, starting there and running towards Keene, and
5 ending at the Rockin' River Resort, that three-and-a-half
6 miles, okay? That's what I'm talking about. How much money
7 is currently in the budget for the Town of Keene for
8 maintenance of that three-and-a-half mile section?

9 MR. NORFOLK: I am gonna object.

10 THE COURT: Overruled.

11 A. I don't really (unintelligible) by monies for this
12 road. There's a lump sum that the Town Board allows me
13 (unintelligible) all town roads. I can't really give you a
14 number on that.

15 Q. Okay. You testified that the town did some
16 maintenance work in 1996. Has it done any since then?

17 A. No, it has not.

18 MR. MUNRO: No further questions.

19 MR. NORFOLK: I just have a few.

20 REDIRECT-EXAMINATION

21 BY MR. NORFOLK:

22 Q. As highway superintendent, is your understanding
23 that if a town road is being maintained, doesn't -- a town
24 road is considered maintained, it doesn't matter who's
25 maintaining it?

1 A. Yes.

2 Q. So, to your knowledge, has the Adirondack Ski
3 Touring Council maintain the Old Mountain Road since '96?

4 A. Somebody has.

5 Q. Okay. One more question, and that is: You were
6 asked by Mr. Munro whether there was any monies in the
7 budget in 2005. Would you expect any money to be in the
8 budget if you qualified abandoned a road?

9 A. No.

10 MR. NORFOLK: No further questions.

11 THE COURT: Anything further, Mr. Munro?

12 MR. MUNRO: No, your Honor.

13 THE COURT: Thank you, Mr. Reed, you may step
14 down.

15 MR. NORFOLK: Thank you, Mr. Reed. Thanks
16 and have a safe trip back.

17 THE WITNESS: Okay, thank you.

18 (Witness was excused.)

19 THE COURT: Call your next witness.

20 MR. NORFOLK: Yes, Judge. I'm gonna call Ken
21 Jubin. I gotta find the questionnaire. Here it is.

22 (Pause in proceedings.)

23 THE CLERK: Just stand right in front of me
24 and I'm gonna swear you in. Can I have your name, please?

25 THE WITNESS: Ken Jubin.

1 THE CLERK: Is it Ken?

2 THE WITNESS: Kenneth.

3 THE CLERK: And spell your last name.

4 THE WITNESS: J-U-B-I-N, as in Nancy.

5 THE CLERK: And your middle initial?

6 THE WITNESS: C.

7 THE CLERK: Please raise your right hand.

8 (Witness duly sworn.)

9 THE CLERK: This is Kenneth C. Jubin,

10 J-U-B-I-N.

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1 K E N N E T H C. J U B I N,
2 having been called as a witness, being duly sworn,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. NORFOLK:

6 Q. Hello, Mr. Jubin. I'm Matt Norfolk, I'm Jim
7 McCulley's plaintiff -- Jim McCulley's attorney. We've met
8 before, obviously. How are you doin' this morning?

9 A. Fine, thank you.

10 Q. Good. I'd ask that you tell the Court where your
11 residence is presently.

12 A. At the Jack Rabbit Inn, which is in Lake Placid,
13 New York.

14 Q. Do you own any other properties besides the Jack
15 Rabbit Inn?

16 A. I do. I have properties on the Old Mountain Road.

17 Q. Okay. Old Mountain Road in the Town of Keene or
18 in the Town of North Elba?

19 A. In the Town of North Elba.

20 Q. Okay. How long have you lived at the -- you call
21 it the Jack Rabbit Inn?

22 A. Since July or August of 19 -- 1997.

23 Q. Are you the owner of the Jack Rabbit Inn?

24 A. I am.

25 Q. And what is the Jack Rabbit Inn?

1 A. Jack Rabbit Inn -- I own the Jack Rabbit Inn. I
2 own the Jack Rabbit Inn and the Jack Rabbit Hostile. Jack
3 Rabbit Inn is a small motel, and the Jack Rabbit Hostile is
4 a hostile, bunk bed accommodations.

5 Q. What kind of clients do you typically get at the
6 Jack Rabbit Inn?

7 A. Pretty much outdoor enthusiasts. We get hikers,
8 skiers, snow shoers, ice climbers. Sometimes we get just
9 general tourists comin' to Lake Placid and --

10 Q. Aren't a number of your customers there, at the
11 Jack Rabbit Inn, 'cause the old mountain -- the Jack Rabbit
12 Trail nearby?

13 A. We do have. That's why we named the Jack Rabbit
14 Inn the Jack Rabbit Inn, 'cause of its proximity to the Jack
15 Rabbit Ski Trail, which pretty much goes right by the Jack
16 Rabbit Inn.

17 Q. You're here under a subpoena, correct?

18 A. Correct. And I want to be here, thank you.

19 Q. Thanks for showin' up. Besides owning and
20 operating the Jack Rabbit Inn, do you have any other
21 employment or positions?

22 A. I am -- I am the Chairman of the Joint Village of
23 Lake Placid/Town of North Elba Zoning Board of Appeals. I
24 am also a board member of the Adirondack Ski Touring
25 Council. That's pretty much my professional -- my

1 professional interests.

2 Q. So you know Tony Goodwin then? Is he the
3 president, I think --

4 A. Yes.

5 Q. -- of the Adirondack Ski Touring Council?

6 A. Correct.

7 Q. The same association you're a part of?

8 A. Correct.

9 Q. Okay. Now, in relation to the -- I'm gonna call
10 it the Old Mountain Road. Where is the Jack Rabbit Inn?

11 A. The Jack Rabbit Inn is approximately 1.8 miles
12 west of the Old Mountain route -- Old Mountain Road on
13 Route 73 towards Lake Placid.

14 Q. Okay. And you said you had other properties?

15 A. I own, as well as my family own, other properties
16 along the Old Mountain Road.

17 Q. In the Town of North Elba or the Town of Keene?

18 A. In the Town of North Elba.

19 Q. Now, is that -- where in the Town of North Elba on
20 the Old Mountain Road do you have these lots that you own?

21 A. Approximately about half to three-quarters of a
22 mile up the Old Mountain Road are our properties.

23 Q. Now, from Route 73, Old Mountain Road, first point
24 nine miles, is that a plowed road?

25 A. Yes, it is.

1 Q. Who plows it, do you know?

2 A. The Town of North Elba.

3 Q. Okay. Is it a paved road, that portion?

4 A. It is not.

5 Q. It's a dirt road, correct?

6 A. It's a gravel road.

7 Q. Gravel road. About how often would you say, if
8 any, do you go up and walk the Old Mountain Road?

9 A. I drive it, I walk it, I ski it. Regularly. I
10 have -- I have a camper up there, my brother has property up
11 there, he stays up there regularly. I work on my property.
12 I -- I would say it varies, but probably four or five times
13 a week.

14 Q. And how long have you been doing this, going up
15 and checkin' out the Old Mountain Road?

16 A. I have since I've owned the property up there. I
17 mean, I love it up there. It's my retreat. It's where I go
18 to get away from my life at the motel.

19 Q. Life at the motel is not too bad?

20 A. Well, it depends, if you like working 16 or 18
21 hours a day.

22 Q. Now, you said since you've owned the property, has
23 it been in your family your entire life or no, something
24 else?

25 A. Actually, my grandfather and my father owned

1 property on the Old Mountain Road since the early 1960s.

2 Q. Okay.

3 A. And my father has gifted some lots to his children
4 and me being one of his children. And also my father and I
5 purchased some property on the Old Mountain Road to -- I
6 purchased it and he purchased it to give us protection along
7 the front of our properties so that nothing could be
8 developed.

9 Q. When you say you walk it and a couple other things
10 before, four or five times a week, do you mean just the
11 point nine gravel road or past the turn-around into the --
12 into the woods there?

13 A. The Town of North Elba is responsible for
14 maintaining that road, and sometimes they don't -- they do
15 not maintain it as frequently, or as up to a standard as
16 many other roads should be, and it has become unsafe. And
17 therefore, my attorney has filed a notice of defects on that
18 road. So, I go up there regularly --

19 THE COURT: Mr. Jubin, when you refer to
20 "that road," in this case, there are sections of the road we
21 are referring to. The first part is the first point nine,
22 the gravel part.

23 THE WITNESS: Okay.

24 THE COURT: And then what continues past the
25 turn-around towards the Town of Keene. What are you talking

1 about?

2 THE WITNESS: I'm talking about the first
3 nine-tenths of a mile and then sometimes I go to the end of
4 the point nine miles and I document it with pictures and I
5 also frequent --

6 THE COURT: Document what with pictures?

7 THE WITNESS: The road.

8 THE COURT: What part of the road?

9 THE WITNESS: All parts of the road.
10 Probably -- sometimes up to the first beaver pond section --

11 THE COURT: Okay.

12 THE WITNESS: -- of the road and, you know,
13 the two sections. So, I document both sections, more --
14 more regularly the first section, the point nine miles.

15 THE COURT: I just ask both of you to be
16 precise as to what part of the road you're talking about.

17 MR. MUNRO: And your Honor, if the witness
18 could also clarify where he owns property on the road.

19 THE COURT: Well, you will have a chance to
20 cross-examine him, Mr. Munro.

21 MR. MUNRO: Okay.

22 MR. NORFOLK:

23 Q. And I think we have been mentioning the
24 turn-around. Do you know what we mean when we say
25 turn-around of the Old Mountain Road?

1 A. Well, there's the turn-around in the beginning
2 near Route 73 and there's a turn-around at the -- there's a
3 little parking area at the beginning of Route 73 and there's
4 a turn-around at the end. So, if you're talking about --

5 Q. I guess at the end.

6 A. At the end of the point nine is the turn-around
7 you're talking about?

8 Q. Correct. That's the area I was referring to.

9 A. Okay.

10 Q. But past the turn-around going into what some
11 refer to as the Jack Rabbit Trail, you've done some
12 documentation there?

13 A. Correct.

14 Q. And you inspect it regularly?

15 A. Correct.

16 Q. And the reason being because of the notice of
17 defect with respect to the point --

18 A. We served a notice of defect that includes the
19 whole road in the Town of North Elba --

20 Q. Okay.

21 A. -- right up to the Town of Keene line. The point
22 nine is a section of that. Beyond that section, there's
23 probably another, I would say, third to half a mile, maybe
24 even a little more, in the Town of North Elba which the
25 Town of North Elba still claims to own.

1 Q. It's safe to say you're pretty familiar with the
2 Old Mountain Road?

3 A. That's safe to say.

4 Q. If I were to show you Plaintiff's Exhibit 96, if I
5 were to show this to you, can you point out to the Court,
6 perhaps mark where, if anywhere, the Old Mountain Road
7 (unintelligible) may be?

8 A. (Unintelligible.) Do I use a pointer or what do I
9 use? What do you want --

10 Q. Hold that first. I will possibly have you circle
11 (unintelligible.)

12 A. Okay. It's this black line right here, that's
13 round like right there, and that's -- all these yellow is
14 rural use, which is, you know, designated for home
15 development and so forth.

16 Q. Is that where your lots are?

17 A. Correct.

18 Q. Do any of your lots go into the blue area?

19 A. No.

20 Q. I am going to ask, Mr. Jubin, the circle which you
21 pointed to is the Old Mountain Road or a portion thereof?

22 A. Well, I -- well, it actually --

23 Q. We will get to that next. Circle that.

24 A. I'll circle what's here.

25 Q. Right.

1 A. Okay.

2 Q. Now, is there any parcel of the Old Mountain Road
3 that are not on this Adirondack Park Agency map?

4 A. Well, I guess that's the question here today. It
5 actually, from what I -- from what I understand, the Old
6 Mountain Road goes to this town line right there
7 (indicating) --

8 Q. Okay.

9 A. -- which is a dotted line. It says Keene here on
10 the right, North Elba on the left and I assume this is the
11 town line, so...

12 Q. Well, you've looked at a map before. It's pretty
13 easy to interpret this map, correct?

14 A. Correct.

15 Q. Okay. Now, could you draw -- we are not gonna
16 hold this to ya, you know, to be a perfect line of where
17 it's gonna be, but can you, in your best attempt, draw where
18 you believe the Old Mountain Road would go and end through
19 North Elba to Keene, if you know?

20 A. Well, it ends up down on this line over here
21 (indicating).

22 Q. That line there?

23 A. That line is an extension of the Alstead Hill Road
24 where Rockin' River is, and I believe -- so I'm gonna draw a
25 line on the end here.

1 Q. Okay.

2 A. That would go -- the Old Mountain Road would go to
3 the Rockin' River. It's obviously twists and turns and so
4 forth.

5 Q. Okay. But that's general direction of the Old
6 Mountain Road?

7 A. General direction.

8 Q. So, how did you know that the black line there was
9 a road?

10 A. I'm familiar with the land. This has obviously
11 been a contentious subject. I've grown up in the area. I
12 ski the road from my property down to Rockin' River
13 regularly, so I know where I'm going.

14 Q. Can you -- can you point where the Bartlett Road
15 is?

16 A. Bartlett Road comes off of Alstead Hill Road where
17 it meets this junction (unintelligible.) black smears here,
18 but basically what I understand was the Bartlett Road is and
19 maybe it's called something else, but my recollection, it
20 goes to -- goes to Upper Jay. It starts here, basically
21 where the Alstead Hill Road goes up towards the Old Mountain
22 Road, and then there's an intersection that goes off to
23 Upper Jay.

24 MR. NORFOLK: Note for the record that the
25 witness is pointing to the section of the black lines going

1 through Sentinel Range as it was circled earlier by Witness
2 Hodgson.

3 BY MR. NORFOLK:

4 Q. Now, one more general question. Other than this
5 area, could you point out a road on this map, other than
6 ones perhaps in red, can you point out another road on this
7 map?

8 A. Well, there are lots of 'em. This is -- this is
9 the Adirondack Lodge Road.

10 Q. How do you know that's a road?

11 A. Because I'm a half a mile from it. I own the Jack
12 Rabbit Inn, a half mile from it, and I know where my
13 property is. I mean, it's a road. Everybody knows that's
14 the Adirondack Lodge Road.

15 Q. But there's no legend for you to see that the
16 black line is a road.

17 A. Well, I mean all you have to -- there's only one
18 road that goes into the wilderness area along that section
19 of road, so...

20 Q. And if I asked you, you could probably point out
21 more roads that are designated on here as black lines,
22 correct?

23 A. Correct.

24 Q. Okay. Did you ever attend a town board meeting,
25 North Elba Town Board meeting in 2002, which discussed

1 whether the Old Mountain Road is a road or a snowmobile
2 trail?

3 A. After reviewing through my materials prior to this
4 trial, I can accurately say yes.

5 Q. You reviewed materials before coming here?

6 A. Correct.

7 Q. Was that at my direction?

8 A. Absolutely not.

9 Q. And do you -- after reviewing the materials --
10 remember being at this meeting?

11 A. Yes, I believe a few of us attended this meeting.
12 There were several meetings, so which -- I mean --

13 Q. Well, let me ask you this.

14 A. When was that?

15 Q. Do you recall bein' at a meeting where Town of
16 North Elba Supervisor on the record stated that the Old
17 Mountain Road --

18 A. I remember being at.

19 Q. -- was a snowmobile trail and not a town highway?

20 A. Yes, I do remember that. There were several
21 meetings during the time frame that you talked about, and at
22 one time, at one meeting, Supervisor Seney would say that
23 it's a snowmobile trail. At the next meeting, she would say
24 that it isn't. So, I mean, it's became quite ridiculous
25 actually.

1 Q. Okay. Did you ever get a copy of those minutes of
2 the meeting where she did say it was -- the Old Mountain
3 Road was a town road?

4 A. Yes, I have minutes --

5 Q. Okay.

6 A. -- statin' that it is a town road and not -- all
7 the portions -- I mean, she has publicly came out and said
8 that all the road in the Town of North Elba has never been
9 abandoned, it's always been a town road.

10 Q. Okay. Do you know Tom Martin?

11 A. I do.

12 Q. Who is he?

13 A. He is a regional forester for the DEC.

14 Q. In 2002, did you forward these minutes of the
15 meeting in the Town of North Elba that we just talked about,
16 where the town board and the town supervisor stated it was a
17 town road, did you forward these minutes of the meeting to
18 Tom Martin?

19 A. I'm not sure if I did or not.

20 Q. Okay.

21 A. I've discussed the Old Mountain Road with
22 Mr. Martin in or about that time.

23 Q. Through your research and I guess paying close
24 attention to the Old Mountain Road and its history, are you
25 pretty -- feel confident that you could point out lots,

1 building lots on a map, if I were to show you it, with
2 respect to the Old Mountain Road in North Elba?

3 A. Yes.

4 MR. NORFOLK: Your Honor, I'm going to offer
5 Plaintiff's --

6 A. I know everybody that owns property up there, so I
7 guess --

8 Q. Okay. That's fine. Thanks, Mr. Jubin?

9 MR. NORFOLK: I'm gonna offer into evidence
10 Plaintiff's Exhibit Number 90, which is Number 1 on the
11 exhibits list. Now, I just want you to give a little
12 explanation. This is a DEC wall map. It comes with four
13 parts, okay? I have here the original, number two part of
14 the DEC map, and I can get out number four that shows the
15 DEC -- says it's a DEC map, okay? I can't submit this in,
16 'cause my partner would kill me. But what I'm lookin' at
17 here is to offer a copy of this, and it's only part two of a
18 four part map, which I have, I could show you if you have
19 any issues of authen- --

20 THE COURT: Mr. Munro?

21 MR. MUNRO: Well, I don't know what he's
22 offering it for. I mean, I'll stipulate it's a DEC map,
23 but --

24 MR. NORFOLK: Okay.

25 MR. MUNRO: What am I supposed to be looking

1 at?

2 THE COURT: Does it include the Old Mountain
3 Road?

4 MR. NORFOLK: Yes, it includes -- this
5 section includes the Town of North Elba, Town of Keene,
6 which has the area of the Old Mountain Road.

7 THE COURT: Any objection?

8 MR. MUNRO: No, your Honor.

9 THE COURT: Plaintiff's Exhibit 90 is
10 received in evidence.

11 (Plaintiff's Exhibit 90 received.)

12 BY MR. NORFOLK:

13 Q. I give you a copy of this map, okay, this DEC map,
14 issued by the DEC, map issued by the DEC. Can you tell me
15 what these --

16 THE COURT: Hold on. Wait for Mr. Munro.

17 MR. NORFOLK: I'm sorry.

18 Q. Take your time. As I said -- take your time.
19 It's hard to look at.

20 A. I know this map.

21 Q. Okay.

22 A. I'm familiar -- I have to look at the lots and so
23 forth, but (unintelligible.)

24 Q. Does this -- look at it. See these little boxes,
25 these squares with numbers in the middle of 'em?

1 A. Yes.

2 Q. What are those, if you know?

3 A. Those are great lot numbers.

4 Q. Okay. Great lot numbers. Now, can you highlight
5 the Old Mountain Road, from Route 73 to Keene, if it's there
6 (unintelligible.)

7 A. (Unintelligible).

8 Q. All right.

9 A. (Unintelligible).

10 MR. NORFOLK: If it's easier to look on a
11 map, the original map, then we could transfer it to the
12 copy. I would do that if that's acceptable.

13 THE COURT: Why don't you wait and see what
14 the witness is gonna do.

15 A. Okay. So you want me to do from 73 down to Keene,
16 down to where?

17 Q. Alstead Hill?

18 A. Alstead Hill. (Witness complies.)

19 Q. Okay. Now, can you tell the Court what lots you
20 have just designated that we have just outlined that the Old
21 Mountain Road goes through?

22 A. Well --

23 Q. Starting from North Elba to the Alstead Hill Road,
24 please?

25 A. This map is a little -- it includes great lot --

1 starts at great lot I believe 132, goes through great lot
2 140, great lots 146 and 147, and great lot 153 and the --
3 that would be the Richards survey, I believe the Richards
4 surveyor set the cone survey. One of these two surveys, I
5 think it's the Richards survey.

6 Q. But is that in the Town of North Elba, those lots
7 you just mentioned?

8 A. Those lots, and then as I --

9 Q. That's good. You don't have to go farther. I'm
10 sorry, I withdraw that. There's no reason to go through the
11 town. Okay. Thank you.

12 Now, if I may ask you about an event in '05.
13 Were you present when Mr. McCulley drove his pickup truck on
14 the Old Mountain Road in May of -- May 22nd?

15 A. Is that the time he was ticketed?

16 Q. The time he was ticketed by Forest Ranger
17 LaPierre, correct?

18 A. Yes.

19 Q. You were there?

20 A. Yes.

21 Q. You observed Mr. McCulley operate his truck, his
22 pickup truck, on the Old Mountain Road past what we have
23 been referrin' to as the turn-around?

24 A. Actually, I came on the scene after he had driven
25 his vehicle beyond the turn-around.

1 Q. And was his vehicle beyond the turn-around when
2 you were there?

3 A. It might have been just beyond the turn-around,
4 meaning probably maybe 20 or 30 feet.

5 Q. Okay.

6 A. The event had already transpired.

7 Q. Okay. Can you tell me, tell the Court, if you
8 know, what lot, great lot, is that turn-around in?

9 A. That is -- that is in -- let's see here. The
10 great lot -- the turn-around is, according to this map, is
11 in great lot 146.

12 Q. According to this map, which is a DEC map,
13 correct?

14 A. Correct.

15 Q. Now -- so Jim McCulley had to have driven his
16 pickup truck through lot 146, correct?

17 A. Correct. I witnessed it through 146 --

18 Q. Okay.

19 A. -- if that's what you're getting at.

20 Q. Yeah. Now, how far from the turn-around to the
21 next boundry for the next great lot, which I think is 153?

22 A. There is -- the next adjacent lot, along the Old
23 Mountain Road, is great lot 153 which is the easterly
24 boundary of the town -- of the road that the Town of North
25 Elba is in.

1 Q. Lots 146 and 153, they're not part of that point
2 nine gravel road of the Old Mountain Road in the Town of
3 North Elba, correct?

4 A. No, that's not correct.

5 Q. Well, explain it to me.

6 A. Okay.

7 Q. I know what you're talking about. Explain it to
8 me.

9 A. Okay. In great lot 146, there's private owner --
10 there's private owner -- ownership is private lands.

11 Q. Okay.

12 A. And so, part of that point nine is in great lot
13 146.

14 Q. And then there's a part of the Old Mountain Road
15 which is not the gravel point nine, that's 146 also?

16 A. Correct.

17 Q. I understand.

18 A. Correct.

19 Q. Thank you for clarifying.

20 (Pause in proceedings.)

21 Q. Are you familiar with the Essex County decision
22 that reversed Mr. McCulley's conviction for operating a
23 snowmobile on the Old Mountain Road?

24 A. I am.

25 Q. Have you read that decision?

1 A. I have.

2 Q. Okay. Have you talked to anyone from the DEC
3 about that decision?

4 A. I probably talked to Stuart Buchanan about the
5 decision.

6 Q. When was that?

7 A. That was in the -- like January or February-ish, I
8 believe, of 2000 -- oh, God, let me see, when was that?
9 That must have been 2005.

10 Q. Well, that would be quite possible, wouldn't it,
11 Mr. Jubin? The decision --

12 A. Once the decision came out.

13 Q. In March of 2005.

14 A. Is when the decision came out?

15 Q. Yes.

16 A. Okay. Well, then shortly after the decision came
17 out then.

18 Q. You spoke with, who did you say?

19 A. Stuart Buchanan.

20 Q. Okay. Who is Stuart Buchanan?

21 A. He's in charge of the DEC in Raybrook.

22 Q. Okay. And what, if anything, did you state or
23 tell Mr. Buchanan?

24 A. Well, it was on or about this time that I came
25 across a Supreme Court case that stated that the Old

1 Mountain Road was created by legislative acts in 1810, 1812,
2 1814 and 1816. And rather than have my attorneys transfer
3 all this information over to him and have a bunch of
4 misinformation, I decided to call Mr. Buchanan up to try and
5 resolve my problems with the apparent problems of the DEC.

6 And so, I explained to him this case that I
7 had, I believed, and where it showed that the DEC did not
8 have any authority to regulate the roads and the highway
9 superintendent is the one who's responsible for
10 maintaining -- for allowing utility lines to go on the road.
11 And so, along that same line, he said he would look at that
12 case and I said, well, along with that, along with the
13 McCulley case, because the County Court just said -- the
14 County Court Judge just said that this road was a road
15 created by these legislative acts, with public funds, in
16 1810, 1812, 1814 and 16 that the DEC must now recognize that
17 this road is a road created by legislative acts, by
18 statutes, rather than user road as the DEC has been
19 maintaining for the past three or four years, four or five
20 years, as far as I can recall.

21 Q. Okay. What did Stu Buchanan -- how did Stu
22 Buchanan respond, if he did at all?

23 A. He responded by saying that the DEC is not
24 recognizing the McCulley case and that the DEC is still
25 under the advisement or impression or I can't recall exactly

1 what word he used, that it was still a user road and
2 Attorney Christopher LaCombe has advised us such and he said
3 Chris is a fine attorney and that's what their advice is and
4 that's what they're sticking to.

5 Q. Okay.

6 A. Basically that's their position.

7 Q. The 1950s case, do you know the name of it?

8 A. It's the People versus The Paul Smith's Light and
9 Power Company.

10 Q. If I were to say Paul Smith's Electric Light and
11 Power Railroad Company, would that be a --

12 A. That would probably be more accurate.

13 Q. What County Court was that in? Or what Supreme
14 Court was that in in the State of New York, if you recall?

15 A. That was in Supreme Court, County of Essex. It
16 happened to be a court case that was on part of the road
17 that we're talking about here today, part of the Northwest
18 Bay Hoppington Road (phonetic).

19 Q. That was my next question. That talked about the
20 Northwest Bay Hoppington Road. We're discussing here the
21 Old Mountain Road?

22 A. They're synonymous, they're one in the same. The
23 Northwest Bay Hoppington Road is the Old Mountain Road. And
24 as a historical note, no one can refute that.

25 Q. Okay.

1 A. So, here we have a case on the Northwest Bay
2 Hoppington Road, in 1915, separate, 100 percent separate
3 than the County Court Judge who had just ruled on this
4 Northwest Bay Hoppington Road and they both say the same
5 thing. So, my mind is, well, if they both say the same
6 thing, we have these two independent judges saying this, why
7 doesn't the DEC recognize this? It's -- I can't believe it.
8 But anyway...

9 Q. Did you provide the Department of Environmental
10 Conservation a copy of this people of the State of New York
11 against Paul Smith's Electric Light and Power and Railroad
12 Company?

13 A. I did. I asked the -- Mr. Buchanan asked
14 Mr. LaCombe to get a hold of my attorney, which he did, and
15 my attorney faxed Mr. LaCombe the decision. And I actually
16 called up Mr. Buchanan a week later, I was tryin' to arrange
17 a meeting to resolve our issue, and I asked him if he had a
18 chance to review or read it and he said he hadn't had a
19 chance, he said he skimmed over it, but he hadn't had a
20 chance to read it at that time, but he had it.

21 (Pause in proceedings.)

22 BY MR. NORFOLK:

23 Q. Getting back to May 22, 2005, the day Mr. McCulley
24 drove his pickup truck on the Old Mountain Road --

25 A. Okay.

1 Q. -- okay? That week prior, had you been up on the
2 Old Mountain Road in that very area where he drove the
3 truck?

4 A. I was up there pretty regularly that week. Word
5 on the street was that Mr. McCulley was gonna drive his
6 truck down the Old Mountain Road that week.

7 THE COURT: Must be a lot of words on the
8 streets of this area.

9 (Unintelligible.)

10 THE WITNESS: We only have one street, it
11 seems --

12 (Laughter.)

13 Q. So --

14 THE WITNESS: The Old Mountain Road.

15 Q. So, did you happen to observe the Old Mountain
16 Road and its edges from the turn-around area, heading in
17 towards the -- towards Keene, into the woods, if you will?

18 A. I was -- I was up there pretty regularly. If it
19 wasn't daily, it was every other day, and I --

20 Q. Okay.

21 A. I was up there -- I think he was supposed to drive
22 his vehicle down the day before, never happened or whatever,
23 I believe I was up there that day.

24 Q. Okay. The day before you were up there, did you
25 see any forest preserve signs on either side of the Old

1 Mountain Road, either at the turn-around, or in towards
2 Keene on either side of the Old Mountain Road?

3 A. Well, they had been down for -- since the McCulley
4 decision was -- since the DEC decided not to appeal the
5 McCulley decision, roughly thereafter. They had been down
6 for most of the time.

7 Q. And you know that how?

8 A. Because I travel the road regularly.

9 Q. Okay. And you observed that condition?

10 A. Correct.

11 Q. Okay. Now, did you see on the day before
12 Mr. McCulley was ticketed any signs that stated motorized
13 vehicle use is prohibited, motor vehicles are not allowed on
14 the Old Mountain Road, which heads into the woods towards
15 Keene?

16 A. Well, I know what you're getting at, and I --

17 THE COURT: Just answer the question.

18 A. I don't believe I did.

19 Q. Okay. Now, let's go to the next day, May 22nd.
20 You were there, Jim was there, correct?

21 A. Correct.

22 Q. Did you observe any signs on either side of the
23 Old Mountain Road, forest preserve signs, any other type of
24 signs, if you recall?

25 MR. MUNRO: Can you clarify where we are on

1 the road at this point?

2 MR. NORFOLK: In the vicinity where
3 Mr. McCulley had just operated his truck and there's the
4 turn-around area.

5 A. We were all standing there and just beyond --
6 probably beyond the turn-around area is where these --
7 probably about maybe 200 feet, maybe 300 feet, somewhere in
8 that neighborhood, of where these signs go up and come down
9 that he's talking about.

10 Q. Okay.

11 A. So, that's where we are.

12 Q. Were they there that day?

13 A. They were there that day.

14 Q. You didn't put 'em up, did ya?

15 A. I did not.

16 Q. Do you know if Jim put 'em up?

17 A. No, Jim did not put them up.

18 Q. Do you recall the condition of these signs? Can
19 you give us a description?

20 A. I didn't go and inspect the signs. I -- I didn't
21 inspect the signs.

22 Q. Okay.

23 A. I -- you know, they are obviously bright and shiny
24 new. I didn't walk up to them, but...

25 Q. But when you saw 'em, were you surprised?

1 A. I don't know, because if -- I mean, this is kind
2 of -- I'm in kind of a bad spot here. I mean, Mr. LaPierre,
3 I don't know if he just put them up or put them up that
4 morning, whatever, but he asked us not to -- you know, to
5 leave the signs up, and Joe is a well respected forest
6 ranger in our community and I hate testifying against him.
7 So -- but his word is, you know, he asked that the signs
8 stay up and so, I mean, as a man telling us men there,
9 whoever he was talking to, that's what he wanted and I'm
10 sure the signs are probably still there.

11 Q. Are you aware that the Town of Keene qualified
12 abandoned the Old Mountain Road in their geographical
13 boundaries?

14 A. I am.

15 MR. NORFOLK: Judge, if I could have 10
16 seconds.

17 THE COURT: Yes. You saw no signs on
18 May 21st?

19 THE WITNESS: Is that -- what is the --

20 THE COURT: That's the day on which
21 Mr. McCulley was charged with driving --

22 THE WITNESS: I saw signs on that day.

23 THE COURT: You did see signs on the 21st.

24 THE WITNESS: Correct.

25 THE COURT: Okay. I was --

1 THE WITNESS: I didn't see signs on the day
2 prior.

3 THE COURT: Thank you.

4 THE WITNESS: Or might have been the day --
5 day or two prior. It's pretty darn close.

6 (Pause in proceedings.)

7 MR. NORFOLK: I apologize for -- I mixed up
8 the dates, 21st and 22nd. But I apologize for that.

9 Reserve redirect. Thank you, Mr. Jubin.

10 THE COURT: Thank you. Mr. Munro.

11 MR. MUNRO: Just a few questions, your Honor.

12 CROSS-EXAMINATION

13 BY MR. MUNRO:

14 Q. Mr. Jubin, you said you own property along Old
15 Mountain Road?

16 A. Correct.

17 Q. Is it along the nine tenths of a mile that is
18 gravel?

19 A. Correct.

20 Q. That's right. Have you ever driven a motor
21 vehicle towards Keene beyond the turn-around into what has
22 been described as the woods yourself?

23 A. What do you consider a motor vehicle?

24 Q. An automobile?

25 A. No.

1 Q. You testified that it's your understanding that
2 the Town of North Elba still believes that it owns the Old
3 Mountain Road. What's the basis for that?

4 A. The basis for that is that the road was created by
5 these legislative acts.

6 Q. No. I want to know their understanding, not
7 yours.

8 A. All right. But I'm gonna get to --

9 THE COURT: I think he's answering -- you can
10 answer the question.

11 A. What has happened with that road is there are
12 sections of that road, the maintenance and improvements and
13 so forth have been evolved on to the towns, which they
14 passed. Town is always, forever and ever, has records here,
15 1853 appropriation for maintenance of that road. So, the
16 town has always maintained that road and never abandoned it
17 and there's been no resolution for abandonment. There was a
18 1904 or '06 resolution to improve the road, at which time
19 they were considering abandoning it but did not. And ever
20 since I've known, no one has ever -- there's not been a
21 resolution that I'm aware of, or -- for abandonment.

22 Q. When did the town last -- of North Elba last
23 maintain the road? And again, I'm talking about starting at
24 the turn-around and heading into the woods towards Keene, to
25 your knowledge?

1 A. I believe probably in the -- probably in the
2 eighties. I would -- Ken Sprock (phonetic) was the highway
3 superintendent after. -- he's got a memory like an iron
4 trap, so I'm sure he can tell ya.

5 MR. MUNRO: No further questions.

6 THE COURT: Any redirect?

7 MR. NORFOLK: No, your Honor.

8 THE COURT: You may step down. Thank you.

9 THE WITNESS: Thank you.

10 (Witness was excused.)

11 MR. NORFOLK: Judge, before I call my next
12 witness, yesterday I brought up the issue of asking for
13 judicial notice of a Town of North Elba public notice,
14 ordinance, resolution. I don't know if I gave the Court a
15 copy.

16 THE COURT: You did not. But have you given
17 Mr. Munro a copy?

18 MR. NORFOLK: Yes, I have.

19 THE COURT: What's your position, Mr. Munro?

20 MR. MUNRO: This is a resolution that I saw
21 signed by the clerk.

22 MR. NORFOLK: Yes. February 12, 1971.
23 Snowmobile ordinance of the Town of North Elba.

24 THE COURT: Is that marked as an exhibit?

25 MR. NORFOLK: I had it marked as an exhibit,

1 your Honor, but it's not an exhibit (unintelligible).

2 THE COURT: What's the exhibit number?

3 MR. NORFOLK: 99.

4 THE COURT: And that again is a resolution?

5 MR. NORFOLK: Public notice of town
6 ordinance. And it's a resolution, yes.

7 THE COURT: Town ordinance. For which town?

8 MR. NORFOLK: Town of North Elba.
9 Plaintiff's Exhibit 99.

10 THE COURT: And what's the date?

11 MR. NORFOLK: February 12, 1971.

12 THE COURT: That's all right. Any objection
13 to its admission?

14 MR. MUNRO: No, your Honor.

15 THE COURT: All right. Plaintiff's Exhibit
16 99 is received in evidence.

17 (Plaintiff's Exhibit 99 received.)

18 MR. NORFOLK: And if I could just raise one
19 more issue of something I have been meaning to offer into
20 evidence, which is not on my exhibits list, but it's a
21 notice of hearing, a state administrative proceeding, which
22 I attached to my motion papers --

23 MR. MUNRO: Fine.

24 MR. NORFOLK: -- as an exhibit. And I ask to
25 have this --

1 THE COURT: It's already a matter of record,
2 isn't it?

3 MR. NORFOLK: Yeah, that's what I thought,
4 too. I mean, it's part of my opposition -- my order to show
5 cause for a preliminary injunction.

6 THE COURT: It's attached to what, Exhibit D
7 to your complaint, I think.

8 MR. NORFOLK: Yes, that's true, too.

9 THE COURT: Okay. It's already a matter of
10 record.

11 MR. NORFOLK: Okay. Great. Just...

12 THE COURT: Call your next witness, please.

13 MR. NORFOLK: Okay. I don't know who it is.
14 LaPierre?

15 MR. MUNRO: Judge, could we get a five-minute
16 recess before the next witness?

17 THE COURT: Yes. We stand in recess for five
18 minutes.

19 (Short recess taken at 10:08 AM.)

20 (Court reconvened at 10:14 PM.)

21 THE COURT: Call your next witness, please.

22 MR. NORFOLK: Mr. Joseph LaPierre.

23 THE CLERK: You know the drill now.

24 THE WITNESS: Yes, ma'am.

25 (Pause in proceedings.)

1 THE CLERK: This is Joseph J LaPierre,
2 L-A-P-I-E-R-R-E.

3 THE WITNESS: Good morning, your Honor.

4 THE COURT: Good morning.

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1 J O S E P H J. L A P I E R R E,
2 having been called as a witness, being duly sworn,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. NORFOLK:

6 Q. Good morning, Ranger LaPierre.

7 A. How are you?

8 Q. Good thanks. How are you? Shall I call you
9 Ranger LaPierre or Mr. LaPierre?

10 A. However you're most comfortable.

11 Q. I'll do Ranger LaPierre. Ranger LaPierre, could
12 you please tell the Court where you live?

13 A. Lake Placid, New York.

14 Q. And how long have you lived there?

15 A. In my capacity as a ranger?

16 Q. No, in general, in your capacity as a person?

17 A. Well, I'm a native, I was born there.

18 Q. Okay. You've lived in Lake Placid your whole
19 life, or the area?

20 A. No. Moved when I was 14, moved back when I was
21 33. So, 20 some years in total.

22 Q. Okay. Now, can you tell me your highest level of
23 education?

24 A. I have a Bachelor's degree.

25 Q. And where did you get the Bachelor's degree?

1 A. State University of New York at Plattsburgh.

2 Q. Did you go to ranger school?

3 A. Negative. No, sorry.

4 Q. There's no requirement for a ranger school?

5 A. No. The ranger school, at Wanakena, is a program
6 affiliated with SUNY. To become a New York State forest
7 ranger, you have certain educational requirements you need
8 to meet, they can be met in other curriculum, other
9 institutions as well, not just the ranger school.

10 Q. And you made the curriculum at your college?

11 A. My degree from Plattsburgh met the requirements to
12 take the exam, yes.

13 Q. Okay. Okay. How long have you been working for
14 the department?

15 A. It'll be 16 years this summer.

16 Q. Okay. So, when was the first year then?

17 A. Well, nine years were as a fish and wildlife
18 technician.

19 Q. Oh.

20 A. And then the forest ranger would be nearly seven
21 years.

22 Q. Where were you fish and wildlife technician?

23 A. It was in Region 5. Part time in the Raybrook
24 office, part time in the Warrensburg office.

25 Q. And what were the scope of your responsibilities

1 and duties as fish and -- say it again?

2 A. Fish and wildlife technician.

3 Q. As a fish and wildlife technician?

4 A. Essentially conducting fisheries, population
5 surveys, wildlife population surveys, collecting scientific
6 data and doing analysis. All of Region 5.

7 Q. Okay. Did you ever work outside Region 5?

8 A. Occasionally, yes.

9 Q. And what would that be?

10 A. Oh, we were sent on special assignments in my
11 capacity as a technician to Vermont to do, (unintelligible)
12 control, to Seneca Lake to do (Unintelligible) control.

13 Q. And what year did you become a ranger?

14 A. 1999.

15 Q. Okay. And what made you want to become a ranger
16 and leave your then current position?

17 A. I had a few acquaintances who were forest rangers.
18 I often volunteered and assisted them with search and rescue
19 missions. The potential for advancement with -- in my
20 current position was quite low.

21 Q. Do you consider being a ranger an advancement?

22 A. Yes.

23 Q. Okay. I did you ever apply for -- or ever apply
24 to take the test to become a State Trooper?

25 A. No.

1 Q. Or any other police agencies?

2 A. Yes.

3 Q. Which ones, please?

4 A. I was on the list for Warren County Sheriff and
5 the New York State Environmental Conservation Police.

6 Q. Okay. Have you ever got -- did you ever got
7 offered a position to be a DEC conservation officer?

8 A. Yes.

9 Q. And did you turn it down?

10 A. Yes.

11 Q. Could you tell the Court your responsibilities as
12 a forest ranger, responsibilities, duties as a forest ranger
13 for the department?

14 A. Sure. In general, we are responsible for
15 conducting and overseeing search and rescue missions,
16 wildland, forest fires and prevention, and care, custody and
17 control of state land.

18 Q. Part of that care, custody and control of state
19 land, does that include enforcement of the laws?

20 A. Yes, as well as wildland fire prevention.

21 Q. Right. Does that include, perhaps, issuing ECATs
22 or tickets?

23 A. Tickets, yes.

24 Q. Can you tell me what an ECAT is?

25 A. Certainly. An ECAT -- it's an acronym for

1 Environmental Conservation Appearance Ticket. It is a
2 simplified information.

3 Q. Like any -- like any kind of simplified
4 information under the criminal penal code?

5 A. Criminal Procedure Law, correct.

6 Q. But this involves environmental law violations or
7 regulation violations?

8 A. That's correct.

9 Q. Okay.

10 A. We get into Criminal Procedure Law, when you're
11 dealing with ECATs, you know, Vehicle & Traffic Law, they're
12 called TSLEDs, traffic safety law enforcement something.
13 When you issue a TSLED, which is the traffic safety, there
14 is a minimum court fee that's tacked on to that, part of the
15 Vehicle & Traffic Law. It's all very technical legalese.
16 Different violations for different sections of law require
17 different simplified informations.

18 Q. When you write an ECAT, when you write a ticket,
19 'cause I guess you include -- when you write a ticket, are
20 you usually the -- generally the prosecuting officer of that
21 ticket?

22 A. That depends.

23 Q. And -- okay. How does it depend?

24 A. There -- once a ticket is issued, it is up to the
25 District Attorney for that area, it becomes his case

1 automatically.

2 Q. In Essex County, does the District Attorney
3 normally prosecute noncriminal violations?

4 A. Generally, no.

5 Q. And then that would -- that responsibility and
6 duty would come back on you Mr. -- excuse me, Ranger
7 LaPierre?

8 A. Either myself or someone from our regional
9 attorney's office.

10 Q. Someone perhaps like Mr. LaCombe?

11 A. Correct.

12 Q. My memory is fading, I have a lot to think about.
13 I think you said you have been a ranger for nine years?

14 A. Seven years. June, seven years. Six years, three
15 hundred and fifty-four days. How's that?

16 Q. How -- if you can recall, or estimate, best of
17 your knowledge, how many tickets have you issued for a
18 person allegedly operating either snowmobile or motorized
19 vehicle on forest preserve land?

20 A. I couldn't give an estimate to be honest.

21 Q. Okay.

22 A. I mean, it's less than a hundred.

23 Q. Okay.

24 A. And probably more than one. Okay?

25 (Laughter.)

1 Q. Okay. Of those -- let's say it's a hundred over
2 the last seven years. How many of them were prosecuted by
3 the Region 5 regional attorney?

4 A. Actually, Matt, let me tell you, it's gonna be
5 significantly less than a hundred. I'll bet you I haven't
6 written five, okay.

7 Q. (Unintelligible.)

8 A. I can't tell you, but I'm telling you I can't give
9 a precise number.

10 Q. For which?

11 A. For violations of motor vehicles on forest
12 preserve.

13 Q. Or snowmobiles on forest preserves?

14 A. That's correct.

15 Q. Just to clarify, you've written maybe five total
16 in seven years?

17 A. Yes.

18 Q. Okay.

19 A. As I -- I'm sorry.

20 Q. No. So, your answer is maybe five in seven years
21 total of a motorized vehicle or snowmobile operating on
22 forest preserve land?

23 A. That's correct.

24 Q. Of those five, how many have been prosecuted not
25 by you or the District Attorney's office but a regional

1 attorney?

2 A. One.

3 Q. And which one was that?

4 A. Excuse me. Let me retract that. None.

5 Q. None. Did you write the ticket for Mr. McCulley?

6 A. Which one?

7 Q. The 2003 --

8 A. Snowmobile on the forest preserve?

9 Q. Right.

10 A. No.

11 Q. Okay. Did you write the ticket for Mr. McCulley's
12 operation of a truck on the Old Mountain Road in 2005,
13 May 22, 2005?

14 A. I did issue that ticket, yes.

15 Q. And what has subsequently happened to that charge
16 that you wrote up the ticket for?

17 A. I was told that the case was going to be handled
18 administratively, and beyond that, I'm not sure of its
19 status.

20 Q. Who told you that?

21 A. I was advised by the regional attorney's office.

22 Q. And the regional attorney is Chris LaCombe?

23 A. Yes.

24 Q. Do you remember who specifically advised you of
25 that from his office?

1 A. I cannot say with 100 percent certainty.

2 Q. Okay. Did they tell you any reason or basis why
3 they were going to prosecute this administratively?

4 A. They didn't give me any specific reasons.

5 Q. What were the general reasons?

6 A. Apparently, discussion with the legal affairs
7 office in Albany, the folks in the legal affairs office in
8 Albany had come up with that suggestion, to do it that way.

9 Q. Okay. I have a similar question -- line of
10 questions for you.

11 With all of your tickets issued, not just the
12 violations of alleged motorized vehicle use for snowmobiles
13 on forest preserve, but all your tickets, how many of
14 them -- well, how many do you think you issued in seven
15 years?

16 A. How many tickets total?

17 Q. Tickets total.

18 A. I couldn't venture to guess.

19 Q. Hundreds? Thousands?

20 A. Not thousands, no. Probably one to two hundred.

21 Q. Okay. How many of those two -- one to two hundred
22 tickets have been withdrawn and then prosecuted or enforced
23 in-house administratively?

24 A. How many administrative cases have I had, is that
25 a better question?

1 Q. Well, I think my question is.

2 A. Okay.

3 Q. Have the tickets that you've issued, of those 200,
4 how many were prosecuted administratively. After you wrote
5 the ticket, enforcement proceedings was commenced as a
6 result of that ticket or of that event that the ticket was
7 written for?

8 A. I have had six administrative cases.

9 Q. Okay. Can you tell me the nature of those cases,
10 the alleged violation?

11 A. Certainly. Two were for illegal disposal of solid
12 waste, unclassified misdemeanor.

13 Q. Okay.

14 A. Is that the information you want?

15 Q. No. That's great.

16 A. Okay. One was for -- the violation was cutting,
17 injuring, removing or defacing trees or vegetation on forest
18 preserve, that had multiple counts, those were all
19 violations.

20 And then I had three possession of alcohol
21 under age 21 on state land.

22 Q. And those were done in an administrative --

23 A. Yes.

24 Q. Okay.

25 (Pause in proceedings.)

1 Q. You testified today you didn't write the ticket
2 for the alleged violation of Mr. McCulley operating a
3 snowmobile in March of '03, correct?

4 A. That's correct.

5 Q. Who issued the ticket? Who wrote the ticket?

6 A. The original ECAT?

7 Q. Yes.

8 A. Ranger Costas.

9 Q. And was that your partner or colleague or how is
10 that?

11 A. Give you a little insight into the ranger world,
12 as Retired Ranger Hodgson stated yesterday, each ranger has
13 his own patrol district. Since 2001 or 2002, the ranger
14 force has been growing, we've kind of had to redraw some
15 lines. It used to be oriented by geopolitical boundaries
16 and up until a year or so ago, two years ago, your ranger
17 district was more oriented around unit areas, state land
18 unit areas, kinda dividing up the workload. When Ranger
19 Costas became a ranger in my zone, he was assigned the
20 Sentinel Wilderness Area.

21 Q. Okay. And that would have been -- in 2003, he
22 still would have been assigned that area?

23 A. Yes.

24 Q. Okay. All right. Did you know that that ECAT
25 that was issued to Mr. McCulley by Ranger Costas was

1 withdrawn?

2 A. Yes. And I'll explain why.

3 Q. That's fine.

4 A. Well, I need to clarify.

5 THE COURT: No. You've answered the
6 question.

7 THE WITNESS: Okay.

8 Q. Thanks. The --

9 (Pause in proceedings.)

10 Q. Are you the one that served a criminal summons on
11 Mr. McCulley relating to his operating a snowmobile on the
12 Old Mountain Road in 2003?

13 A. I can't say for sure.

14 Q. Okay. Now I want to jump ahead to 2004, okay?
15 Did you ever get a report or hear through the grapevine, as
16 some of the witnesses have been saying today, that
17 Mr. McCulley and two of his friends were hiking in the High
18 Peaks with cameras?

19 A. I had heard that.

20 Q. How did you hear about that?

21 A. I can't honestly say how. I don't know how.

22 Q. When you heard about it, what, if anything, did
23 you do, meaning did you report it to the DEC?

24 A. No.

25 Q. And why didn't you?

1 A. Because there was no need for concern that
2 Mr. Maliggi, Mr. Padue and Mr. McCulley were hiking the High
3 Peaks. God bless their little hearts.

4 Q. I agree. Did you find nothing wrong with taking
5 pictures and measuring the widths of some trails?

6 A. As far as I was concerned, I had no problem with
7 it.

8 Q. Okay. You're pretty well-versed, I would think,
9 in the laws and rules and regs that you're enforcing,
10 correct?

11 A. I try.

12 Q. Okay. With seven years, you probably know them
13 quite well, correct?

14 A. Yes.

15 Q. Do you know of any rule or regulation which
16 prohibits, back in '04, prohibits people from hiking in the
17 High Peaks, taking pictures and doing some measurements of
18 the widths of trails?

19 A. There are no regulations that prohibit people from
20 hiking, there are no regulations that prohibit photography
21 or taking pictures. There is a regulation in the eastern
22 High Peaks wilderness, Title 6 NYCRR 190.13, that conducting
23 research or any scientific project -- I can't -- I'm not
24 giving you the exact verbiage, Matt.

25 Q. That's fine.

1 A. But anything in that regard requires a permit from
2 the department.

3 Q. Okay. Do you know when this hiking expedition
4 occurred by Mr. McCulley?

5 A. No.

6 Q. Would you say safe to say, correct me if I'm
7 wrong, of course, end of May in 2004?

8 A. I believe that's what he testified to, yes.

9 Q. Okay. Okay. That's right, you were here.

10 Did you happen to observe Mr. McCulley a few
11 days later in Lake Placid?

12 A. I can't say how much later it was, but, yeah, I
13 spoke to Jim, he came and talked to me.

14 Q. Okay. Where was this?

15 A. I didn't remember it to be the firehouse, but
16 that's what Mr. McCulley testified to. And I have seen him
17 there on regular occasions, I conduct a fair amount of
18 business out of there.

19 Q. Okay. Just gonna remind you you're under oath.

20 A. Sure.

21 Q. Did you tell, did you advise Mr. McCulley that you
22 could arrest him for his actions in the High Peaks area?

23 A. I could say in all good faith and under oath that
24 I probably mentioned to him that it was a violation to
25 conduct scientific research without a permit. Did I

1 threaten with arrest? No.

2 Q. But you didn't believe, as you testified today,
3 correct me if I'm wrong, you didn't believe they were
4 violating any rules and regs, correct?

5 A. As far as I was concerned, no.

6 Q. Okay. Thank you.

7 A. It's often part of my job to advise -- I'm sorry,
8 go ahead.

9 Q. No, I just ask --

10 A. Go ahead. We'll keep it quick today.

11 Q. I'm tryin'. Now, you know that in March, I think
12 it was specifically March 25, 2005, Judge Halloran, Essex
13 County Court, reversed -- on appeal reversed the conviction
14 of Mr. McCulley for operating a snowmobile on the Old
15 Mountain Road?

16 A. Yes, I do.

17 Q. Have you had a chance to review that decision?

18 A. I was provided a copy and I read it.

19 Q. Who were you provided a copy by?

20 A. I believe when the department staff received it, I
21 was given a copy.

22 Q. What's the -- who is the department staff?

23 A. Someone in -- within the Region 5 office in
24 Raybrook.

25 Q. And who personally gave you a copy? Or was it in

1 your mailbox?

2 A. It was in my mailbox, I believe.

3 Q. Okay. And was there any note stuck to it?

4 A. I don't recall. Maybe just a sticky note with my
5 name on it.

6 Q. Okay. And you took that to mean you must read
7 this? Because I think you testified you were directed to
8 read it.

9 A. I wasn't directed to read it.

10 Q. Oh, okay.

11 A. No. It was provided to me.

12 Q. Fair enough. Okay. Did you read that decision?

13 A. I read it.

14 Q. Okay. After it was issued, this decision, did the
15 rangers have any meeting about this, discuss the decision?

16 A. Not that I recall.

17 Q. Okay. Did you have any meetings with any
18 department staff to discuss this decision and the status of
19 the Old Mountain Road, Mr. McCulley, after this decision was
20 issued?

21 A. Not that I recall.

22 Q. Did anyone from the department ever inform you or
23 tell you that the department was going to ignore this
24 decision, not recognize this decision by the Essex County
25 Court?

1 A. I can't say that I heard that.

2 Q. Can you say that you heard it?

3 A. No. I don't recall hearing it.

4 Q. Okay. Let's jump ahead to May 11, 2005, okay?

5 Now, did you get a report of possibly someone operating an
6 earth-moving vehicle or a tractor at the Old Mountain Road?

7 A. I -- I had heard that, but I can't say that that
8 was the date I heard about it.

9 Q. Okay. But you heard -- you got -- was this a
10 report or how did you hear about this alleged incident of
11 either a tractor or a earth-moving vehicle on the Old
12 Mountain Road?

13 A. Prior to the spring of 2005, near the turn-around
14 at the end of Mountain Lane --

15 Q. Yes.

16 A. -- which is the town maintained portion of the
17 road, there were boulders. And I had heard that the
18 boulders had been moved.

19 Q. Okay. And did you investigate whether this event
20 actually took place?

21 A. The boulders were on private land.

22 Q. Um-hum.

23 A. And I didn't have a complaint from the land owner,
24 so I didn't have anything -- any reason to really pursue it.

25 Q. Okay. But do you recall speaking to --

1 questioning -- withdrawn.

2 Do you recall sometime in May questioning
3 Mr. McCulley about this incident?

4 A. I recall pulling off of Sentinel Road, seeing
5 Mr. McCulley across from Land Lumber, and yeah, we spoke
6 about it, I asked him if he had heard anything or knew
7 anything about it.

8 Q. Did you inform him that Tom Martin and the rest of
9 Raybrook think if anything happens on the Old Mountain Road,
10 Martin had somethin' to do with it?

11 THE COURT: Martin had somethin' to do with
12 it?

13 MR. NORFOLK: No. Sorry. You're right.

14 Q. McCulley had somethin' to do with it? Sorry.

15 A. I can't honestly say that I remember mentioning
16 Mr. Martin's name.

17 Q. Okay.

18 A. All right? All of my discussions prior to late
19 May of 2005 with Mr. McCulley have always been very cordial.

20 Q. Okay.

21 A. So, I --

22 Q. I'm sorry. The -- so your testimony is, correct
23 me if I'm wrong, you didn't mention Tom Martin's name, but
24 you stated to him the rest of Raybrook thinks if anything
25 happens on the Old Mountain Road, he may be responsible for

1 it, somethin' like that?

2 A. No. I think I may have said something along the
3 lines that, you know, if anyone knew anything that might be
4 going on there, I would ask Jim.

5 Q. Okay. Now, is it a big deal if someone brings a
6 bulldozer or removes boulders at the mouth of this
7 turn-around? Isn't that a violation?

8 A. No. That's private land, unless the private land
9 owner wants to issue a complaint that they did so, but none
10 of us were ever contacted in that regard.

11 Q. Okay. Now, we are going to go ahead a few days, a
12 couple weeks. End of -- end of May 2005.

13 A. Sure.

14 (Pause in proceedings.)

15 BY MR. NORFOLK:

16 Q. Did you receive a phone call from Mr. McCulley on
17 May 20th?

18 A. May 20th? I don't have a calendar in front of me
19 to remember what day of that week. If that was --

20 Q. I will just cut to the chase.

21 A. Yeah.

22 Q. Did you call Mr. McCulley first or did he call you
23 first on May 21st, May 20th?

24 A. That was the weekend that everything --

25 Q. Right.

1 A. I was on pass day on that Saturday, a day off.

2 Q. Please, just answer the question. Yes or no, did
3 you call Mr. McCulley first or did he call you first that
4 weekend?

5 A. I called and left Mr. McCulley a message.

6 Q. Did Mr. McCulley return that phone call?

7 A. Yes, he did.

8 Q. When he returned that phone call, did you guys
9 actually speak on the phone?

10 A. Yes.

11 Q. Okay. Did you ask Mr. McCulley if he was going to
12 ride his pickup truck on the Old Mountain Road?

13 A. No.

14 Q. During this conversation, did it come to your
15 knowledge that Mr. McCulley would be on the -- at the Old
16 Mountain Road the next day?

17 A. The pretext of my conversation was is I had heard
18 from Ranger Costas that there were going to be a bulldozer,
19 and chain saws and motor vehicles going on the forest
20 preserve and I asked Jim if he knew anything about that.

21 Q. Okay. Let's go to the next day, May 22nd. I
22 believe it was a Sunday, but I'm not sure. Do you recall
23 what day it was?

24 A. It was a Sunday.

25 Q. What time did you arrive at the turn-around on the

1 Old Mountain Road that day?

2 A. I don't recall specifically. I would say sometime
3 around 9:15, 9:30.

4 Q. Okay. And what time did you expect Jim to be
5 there that day?

6 A. He had told me that they would be there sometime
7 around ten.

8 Q. Okay. So what were you gonna do the first half
9 hour before?

10 A. I took some photographs, I put up some new
11 posters.

12 Q. What are posters?

13 A. Posters are aluminum signs.

14 Q. And what signs were those?

15 A. The sign that was present on the yellow birch tree
16 on the left side of the road was one of our antiquated DEC
17 forest preserve signs.

18 Q. And you put that up that day?

19 A. No, that one has been up for -- probably Ranger
20 Hodgson put that one up a long time ago. Our regional
21 policy is now, when we put up forest preserve signs, they
22 need to identify the unit area that they are, i.e.,
23 wilderness, wild forest (unintelligible).

24 Q. Okay. Did you put a -- you said you put up
25 posters. Was one of those posters a sign that prohibited

1 motor vehicle use on the road?

2 A. Those posters of the forest preserve only
3 identified it as a wilderness area.

4 Q. No, I understand that. My question was --

5 A. There were --

6 Q. My question was did you put up --

7 A. I'm getting there.

8 Q. Okay.

9 A. Underneath the wilderness area posters, we have
10 a -- we call it the "no" sign, no aircraft, no snowmobiles.

11 Q. Right.

12 A. I put one of those back up. There's been one
13 there historically. And a long time ago I put up a motor
14 vehicle -- no motor vehicles or motor vehicles prohibited, I
15 can't give you the exact language, I had put one of those
16 up. That was gone, so I also put a new one of those up.

17 Q. I understand. They weren't up, though, that day.
18 You put 'em back up, correct?

19 A. The forest preserve poster was there.

20 Q. Okay.

21 A. The no sign and the no motor vehicles were gone.

22 Q. And you put 'em up that day?

23 A. I put those back up, yes.

24 Q. Approximately a half hour before, knowing that
25 Mr. McCulley was going to come operate his vehicle on the

1 Old Mountain Road?

2 A. Yes.

3 Q. Okay. Were you directed to put those signs up?

4 A. No. That's part of -- routine part of my job.

5 Q. Okay.

6 (Pause in proceedings.)

7 Q. One more question. With respect to the allegation
8 or the -- withdrawn.

9 A -- we were talkin' about the boulders being
10 moved, okay?

11 A. Um-hum.

12 Q. Were there any incidents in the last year or two
13 about a tractor operating, turning around, not on the part
14 of the turn-around, but more on the Old Mountain Road, Jack
15 Rabbit Trail?

16 A. I had heard that there was -- I had heard a report
17 that someone had taken a motor vehicle of that type down the
18 roadway, and when I went there, there was evidence of a
19 large wheeled -- large tired vehicle that had gone through
20 there.

21 Q. Did you ask Mr. McCulley about that?

22 A. I may have asked him if he knew of anybody that
23 had taken a tractor down there.

24 Q. A tractor does more damage than a pickup truck,
25 correct?

1 A. A motor vehicle is a motor vehicle according to
2 the Vehicle & Traffic Law.

3 Q. That wasn't the question. But couldn't a big
4 tractor do more damage to making ruts and -- possibly
5 because of the size -- do more damage to the forest preserve
6 than a pickup truck drivin' down the Old Mountain Road?

7 A. Depends on the condition of the trail.

8 Q. But it's a big deal if a pickup truck's on the
9 road, correct?

10 A. It's a big deal if any motor vehicle is.

11 Q. Exactly. Exactly. What kind of investigation did
12 you do when you found out there was evidence of a big
13 tractor goin' down Old Mountain Road?

14 A. I checked around with a few local folks to see if
15 they had heard anything about it, through the grapevine.

16 Q. And that's the end of it? You couldn't find
17 anyone? Okay.

18 I am gonna give you what's Plaintiff's
19 Exhibit 96.

20 A. Sure.

21 Q. Mr. LaPierre, you know what this is?

22 A. Yes.

23 Q. Do you use this often?

24 A. Not very often.

25 Q. No?

1 A. No.

2 Q. Do you refer to it, did you (unintelligible)?

3 A. I've looked at it, but I don't use it.

4 Q. Okay. Do employees in Region 5 of DEC, are
5 they -- do they typically, forest ranger or forester, have
6 copies of this?

7 A. I'm sure every ranger and every forester must have
8 a copy.

9 Q. Okay. Can you easily identify state routes, local
10 roads on this map?

11 A. (Unintelligible).

12 Q. For example (unintelligible) let's just go over
13 here.

14 A. Sure.

15 Q. There's a red line there. Can you tell me if
16 that's -- do you know if that's a road or not?

17 A. It has the interstate highway symbol, 87, so I
18 guess it would be the interstate Route 87.

19 Q. I apologize for some of my obvious questions.

20 A. No offense taken.

21 Q. But -- okay. Well, there's a red one here, it's
22 got the same type of sign, signage is different, I think
23 that means state route?

24 A. Um-hum.

25 Q. Okay. 73 is red. What is that, do you think?

1 A. That's probably an indices of State Route 73.

2 Q. Okay. All right. How about a black line there,
3 is that a road or river or what do you think that might be,
4 this black line right there? Just pointing to one I just
5 happen to pick out.

6 A. Again, there's no legend to tell exactly what
7 we're looking at and its not labeled.

8 Q. But you know the High Peaks area?

9 A. Yes, I do.

10 Q. You know the Adirondack Lodge?

11 A. Yeah. Yes, I do.

12 Q. You know -- you probably can point where Heart
13 Lake is?

14 A. Yes.

15 Q. Can you point that out?

16 A. It's right here (indicating).

17 Q. What's that black line that goes to it, do you
18 think you have an idea?

19 A. I think that may be a depiction of where
20 Adirondack Lodge Lane is.

21 Q. Right. The road to the lodge, correct?

22 A. Yes.

23 Q. Okay. My point is, the black line, and you know
24 it's a road, correct?

25 A. Yes.

1 Q. Okay. Thanks. Do you think regional foresters --
2 in your experience as being a ranger, do you think regional
3 foresters should know the parameters of a wilderness area, a
4 UMP?

5 A. Define "parameters." I'm --

6 Q. Do you think they would know, they could state the
7 boundaries of Sentinel Range -- for example, Sentinel Range
8 Wilderness area. Do you think a regional forester should
9 say, yeah, there's the wilderness area right there on the
10 map, I know what the boundaries are?

11 A. He might be able to give some of the physical
12 boundaries, but very often we have boundry lines that are --
13 there's no definite boundary.

14 Q. Would you expect a regional forester to know if a
15 town road's intersecting a wilderness area or not? For
16 example, Sentinel Range Wilderness area?

17 A. A regional forester? I can't say for sure.

18 Q. How about Forester Tom Martin? Would you expect
19 him to know if a road, town road, intersected the Sentinel
20 Range Wilderness area?

21 A. We have so many Unit Management Plans in progress
22 right now, I cannot speculate as to what Tom should or
23 should not know.

24 Q. Would you expect him to know it, though?

25 A. I would expect it to be my duty that if I was

1 discussing it with him and he didn't, I would bring it to
2 his intention.

3 Q. Okay.

4 MR. NORFOLK: I think that is all. I reserve
5 for redirect. Thank you, Judge. Thank you, Mr. LaPierre.

6 THE COURT: Mr. Munro.

7 MR. MUNRO: A few questions, your Honor. Can
8 I approach the witness with some photographs?

9 THE COURT: Yes.

10 MR. NORFOLK: May I also, your Honor?

11 THE COURT: Yes. Well, they're
12 photographs -- not yet. You don't need to approach with
13 him.

14 MR. NORFOLK: Okay.

15 (Pause in proceedings.)

16 CROSS-EXAMINATION

17 BY MR. MUNRO:

18 Q. I'm gonna call you Ranger Joe, if that's all
19 right?

20 A. Wonderful.

21 Q. Ranger Joe. Could you take a look at those
22 photographs, and if everyone could please try and keep them
23 in order, they're marked on the back.

24 A. (Witness complies.)

25 Q. Are you done?

1 A. Yes.

2 Q. Did you take these photographs?

3 A. I took those (indicating). These are
4 enlargements, I believe. I didn't take this exact photo. I
5 took (unintelligible).

6 Q. Okay. When did you take the photos --

7 THE COURT: Just for the record, what are the
8 exhibit numbers?

9 MR. MUNRO: They're 1 through 6 are marked on
10 the back, your Honor.

11 THE COURT: All right.

12 MR. MUNRO: These are Exhibit 26 on our
13 exhibit list. We listed them as one exhibit, but there are
14 six separate photographs. These were previously provided to
15 plaintiff's counsel.

16 THE COURT: Is there an objection?

17 MR. NORFOLK: No, your Honor.

18 THE COURT: Are they being offered?

19 MR. MUNRO: Yes, your Honor.

20 THE COURT: Defendant's Exhibits 1 through 6
21 are received in evidence.

22 (Defendant's Exhibits 1 through 6 received.)

23 BY MR. MUNRO:

24 Q. Could you please tell the Court what the first
25 photograph depicts?

1 A. The photograph marked on the back DEF Number 1,
2 this is a photo taken from the turn-around area at the end
3 of Mountain Lane, looking down the Jack Rabbit Trail, and
4 the Jack Rabbit Trail heading in the direction of Keene.

5 Q. So we are in the Town of North Elba, correct?

6 A. Yes. That's correct.

7 Q. Okay. And let's take a look -- is that a fair and
8 accurate representation of looking at each of the routes
9 from the turn-around?

10 A. We're looking right down the trail, you can see
11 the boulders and the footprint of where a boulder may -- was
12 at one time; you can see where it had been moved.

13 Q. And you mentioned before that the boulders were on
14 private property, is that right?

15 A. That's correct.

16 Q. Can you tell us where private property ends and
17 state property begins on this first photo?

18 A. The state land boundry line, you can see off in
19 the distance, you can just make out the forest preserve
20 poster on the tree.

21 Q. Let's look at the second photo. And what does
22 this photo depict?

23 A. This is a photo again of the Jack Rabbit Trail, in
24 proximity of the forest preserve line.

25 Q. And the --

1 THE COURT: What does that mean,

2 Mr. LaPierre? What does that mean?

3 THE WITNESS: State land boundry line.

4 THE COURT: Where on the road is this?

5 THE WITNESS: On the -- in the left-hand side
6 of the photo, you can see the forest preserve posters and
7 the other posters.

8 THE COURT: How far from the turn-around is
9 this?

10 THE WITNESS: We're talking maybe a couple of
11 hundred yards. This poster on the tree, in Number 2, is the
12 same poster you can see off in the -- way off in the
13 background --

14 THE COURT: Thank you.

15 THE WITNESS: -- in Number 1.

16 BY MR. MUNRO:

17 Q. And what is the date these photographs were taken?

18 A. This would have been the morning I was to meet
19 Mr. McCulley, I believe it was the 22nd of May, as he
20 testified.

21 Q. Okay. So, looking at the second photograph where
22 you see, I think it's a yellow poster, that's where state
23 wilderness land begins, is that correct?

24 A. The line -- if I recall correctly, that tree that
25 they are nailed on is blazed with the survey marks. So the

1 line comes across the roadway in that general area.

2 Q. So, looking into that photo, everything beyond
3 that is state land?

4 A. That's correct.

5 Q. Let's take a look at the third photo. What are we
6 looking at here?

7 A. This photo is a close-up of the posters seen in
8 Exhibits 1 and 2. If you look at the poster that says
9 forest preserve wilderness area, behind there is an older
10 metal poster that just had state -- it said forest preserve.
11 Our regional policy now is to make sure forest preserve
12 boundaries are marked with posters reflecting their unit
13 area. Hence, I put up the wilderness area posters over the
14 existing poster that was there.

15 Q. And when did you put up the top poster that says
16 forest preserve wilderness area?

17 A. I put that up that morning when I was there.

18 Q. And the two posters below it, the one that says no
19 motorized equipment, et cetera, and no bicycles, when were
20 they put up?

21 A. Originally, I had put up posters very much like
22 those, can't say they were exact. I mean, those posters I
23 put up a few years ago. When I was there that day, they
24 were no longer up, so I put new ones up.

25 Q. In your experience, do posters like this sometimes

1 disappear or get taken down?

2 A. Absolutely.

3 Q. And is part of your job to --

4 A. Put 'em back up.

5 Q. -- put 'em back up?

6 Let's look at photo Number 4. What are we
7 looking at here?

8 A. Photograph Number 4, the reason I took this is
9 while I was there, trying to define where the state land
10 boundry crossed the Jack Rabbit Trail, going from one blazed
11 mark tree to another blazed mark tree, for definition in
12 taking photographs, in preparation, you can see two pieces
13 of birch log that I've laid in the trail. I used those to
14 demark where the line crosses the trail. So, anything
15 beyond those birch logs is forest preserve land, wilderness
16 area.

17 Q. And when did you lay those logs there?

18 A. I did that that morning.

19 Q. Did you do that before Mr. McCulley arrived?

20 A. Yes.

21 Q. Let's look at photo Number 5. What does this
22 depict?

23 A. This would be the opposite side of the trail,
24 showing where the forest preserve line crosses, and if you
25 look through the balsams, you can see another forest

1 preserve sign nailed on the tree, appears to be yellow
2 birch, in the woods.

3 THE WITNESS: Your Honor, it's right through
4 the trees right there (indicating).

5 Q. So, in other words, you're on the state land side?

6 A. No. I'm on the private land of the Town of North
7 Elba side, looking on to forest preserve.

8 Q. Okay. And then let's look at the last photo,
9 Number 6.

10 A. Sure.

11 Q. What's that depict?

12 A. After Mr. McCulley arrived, he turned his vehicle
13 around and, as you can see, the position of his vehicle, he
14 backed down the roadway. If you look closely off each side
15 of the trail, you can still see the birch logs. I did not
16 leave them in the trail. I didn't want to have any hazards
17 in the trail, so I moved them off to the side. But they're
18 still there for a reference of where the forest preserve
19 line crosses.

20 The reason I wanted to mention that, you
21 know, Mr. McCulley backed his vehicle in there is so there
22 wasn't any implying that he went in and turned around and
23 came back out. His vehicle is facing coming back out toward
24 the turn-around.

25 Q. Did Mr. McCulley, at any point, ask you where the

1 state land boundry was?

2 A. I don't recall.

3 Q. Is it your understanding that he knew that he was
4 on state land with his pickup truck?

5 A. I believe it is.

6 Q. Let me just ask you a few more questions. You
7 mentioned that in 2005, that the ticket that you issued
8 Mr. McCulley for driving his pickup truck on the Jack Rabbit
9 Trail, that that ticket was withdrawn, is that correct?

10 A. For driving his motor vehicle on forest preserve,
11 that ticket was withdrawn from the North Elba Town Court.

12 Q. Okay. And who made that decision to withdraw the
13 ticket?

14 A. That was made by our regional attorney's office in
15 discussion with the region -- the Albany legal office, I
16 believe.

17 Q. And I believe you testified that subsequent to
18 that, an administrative enforcement proceeding was initiated
19 against Mr. McCulley, is that correct?

20 A. To the best of my knowledge, yes.

21 Q. And did you make that decision to enforce
22 administratively against Mr. McCulley?

23 A. No, I did not.

24 Q. Were you involved in that decision?

25 A. No, I wasn't.

1 Q. Were you consulted at all as to whether that
2 enforcement Avenue was an appropriate way to go?

3 A. I was advised that that was the way the department
4 was going to pursue the case.

5 Q. Okay.

6 MR. MUNRO: No further questions. Thank you.

7 MR. NORFOLK: I just have a few.

8 REDIRECT-EXAMINATION

9 BY MR. NORFOLK:

10 Q. You testified earlier, Forest Ranger LaPierre,
11 that since '02 or three, the rangers had specific regions
12 within the -- specifics units within the ranger --

13 A. A ranger district, patrol areas.

14 Q. Ranger districts. In May of 2000 -- in May of
15 2005, what were -- where were you assigned?

16 A. I was still with the Town of North Elba, is
17 essentially -- encompassed my ranger district.

18 Q. Does that include the Old Mountain Road where we
19 were?

20 A. The portions of the Town of North Elba, the unit
21 areas that I was the ranger responsible for, are portions of
22 the western part of the eastern High Peaks Wilderness, the
23 eastern portion of the western High Peaks Wilderness, the
24 McKenzie Wilderness and the Saranac Lake Wild Forest.

25 Q. So, forgive me, I don't know all those. Was the

1 Old Mountain Road part of your unit?

2 A. The Old Mountain Road is in the Sentinel Range
3 unit.

4 Q. So it's not part of your unit to be responsible
5 for?

6 A. It's part of my zone and when the adjacent ranger
7 is not working, for coverage, we cover the adjacent areas.

8 Q. You said earlier you put a sign up at sometime way
9 back, correct?

10 A. Yes.

11 Q. But that wasn't your area?

12 A. I cannot remember the exact date and it may have
13 been prior to 2002 or whenever Ranger Costas came and we
14 changed our little geopolitical subdivisions. I don't
15 recall specifically.

16 Q. May I approach and just grab these for a second?

17 A. Absolutely.

18 Q. For clarification, Defendant's Exhibit Number 3,
19 you put these signs up the morning that Mr. McCulley
20 operated on his truck, yes or no?

21 A. I put the wilderness area poster over the old
22 forest preserve poster.

23 Q. Okay.

24 A. I put -- replaced the no sign.

25 Q. Was there a sign there?

1 A. The sign was missing when I arrived.

2 Q. Okay.

3 A. So I put this one up, and I also put the mountain
4 bike prohibition sign up.

5 Q. The sign underneath this forest preserve sign,
6 doesn't it say -- did it state no motorized equipment, no
7 motorized vehicles, no motorized boats, no aircraft, no
8 snowmobiles?

9 A. No, it said forest preserve.

10 Q. Okay. So, then, naturally it didn't say no
11 bicycles with a sign, correct?

12 A. That's correct.

13 MR. NORFOLK: No further questions. Thank
14 you.

15 THE COURT: Anything else, Mr. Munro?

16 MR. MUNRO: No, your Honor.

17 MR. NORFOLK: Thanks.

18 THE WITNESS: You're welcome.

19 THE COURT: Excuse me, Ranger LaPierre.

20 THE WITNESS: Yes.

21 THE COURT: You said you were provided with a
22 copy of the McCulley decision from the Essex County Court
23 sometime after?

24 THE WITNESS: Judge Halloran's decision.

25 THE COURT: Yes. After that, did you

1 personally take any steps to remove signs from the road?

2 THE WITNESS: No, I did not.

3 THE COURT: Are you aware of any DEC employee
4 who did take any such steps to remove signs from the road
5 after the McCulley decision?

6 THE WITNESS: I am not aware of that.

7 THE COURT: All right. Thank you. You may
8 step down.

9 (Witness was excused.)

10 MR. NORFOLK: Your Honor, I hate to delay
11 (unintelligible) recess? I really do.

12 THE COURT: We'll wait for you.

13 MR. NORFOLK: Okay.

14 (Pause in proceedings.)

15 THE COURT: Mr. Norfolk, are you ready?

16 MR. NORFOLK: Yes, Judge.

17 THE COURT: Call your next witness, please.

18 MR. NORFOLK: Christopher Lacombe.

19 THE CLERK: Is it Christopher?

20 THE WITNESS: Yeah.

21 THE CLERK: And spell your last name.

22 THE WITNESS: L-A --

23 THE CLERK: L-A.

24 THE WITNESS: Small C-O-M-B-E.

25 THE CLERK: And your middle initial?

1 THE WITNESS: A.

2 THE CLERK: Will you raise your right hand?

3 (Witness duly sworn.)

4 THE CLERK: This is Christopher A. Lacombe,

5 L-A-C-O-M-B-E.

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1 C H R I S T O P H E R A. L A C O M B E ,

2 having been called as a witness, being duly sworn,

3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. NORFOLK:

6 Q. Good morning, Mr. Lacombe.

7 A. Good morning.

8 Q. Could you tell the Court where you reside?

9 A. I reside in Peru, New York.

10 Q. Where is Peru, New York?

11 A. Peru, New York, is about 10 miles south of
12 Plattsburgh and it's about 50 miles or so from Raybrook/Lake
13 Placid area.

14 Q. So you commute every day?

15 A. Correct.

16 Q. Ask you tell the Court your position presently
17 with the department?

18 A. I'm the regional attorney for New York State
19 Department Region 5, which is -- which encompasses or
20 comprises an eight-county area.

21 Q. And how long have you been an attorney, regional 5
22 attorney?

23 A. I've been in the position since November of 1996,
24 so it's been a little over nine years.

25 Q. And before you were a regional attorney, did you

1 hold any positions with the department?

2 A. No.

3 Q. Okay. Before becoming an attorney for the
4 department, where were you employed, if anywhere?

5 A. I graduated from law school in 1986, from Western
6 New England School of Law. I became licensed to practice
7 law in the State of New York, Massachusetts and Connecticut.
8 I was a JAG officer in the United States Navy from 1986,
9 '87, to 1990. And from 1990 to 1996, I was in private
10 practice in the Plattsburgh area.

11 Q. Okay. So, since your employment with the
12 department, you've always been a regional attorney?

13 A. Correct.

14 Q. For Region 5?

15 A. Correct.

16 Q. Are you aware that Mr. McCulley operated a
17 snowmobile on the Old Mountain Road on March 20, 2003?

18 A. That's correct.

19 Q. And are you aware that an ECAT was issued by
20 Forest Ranger Costas?

21 A. That's correct.

22 Q. At some point, was that ECAT rescinded by the DEC?

23 A. Yes, it was. There -- at the time after the ECAT
24 was issued, it was understood that the ranger had not
25 actually observed the violation. So, therefore, looking at

1 the requirements of Criminal Procedure Law, it was
2 determined that what was appropriate was to use a long form
3 information as opposed to, which required the issuance of a
4 summons for the Town Justice Court.

5 Q. Okay. Do you recall if the criminal summons was
6 ever served?

7 A. The criminal summons, I believe, was served in
8 late June of 2003.

9 Q. Okay. Late June 2003. Was there any motion
10 practice in the -- withdrawn.

11 Where was the summons -- criminal summons
12 filed?

13 A. The criminal summons was filed in the Town of --
14 was issued, actually, by the Town of Keene. It was based
15 upon the long form information that had been filed with the
16 Town of Keene.

17 Q. Okay. Have you had a chance to look at
18 Mr. McCulley's voluntary statement with respect to that
19 violation?

20 A. I have at some time, yes.

21 Q. Necessary to probably prosecute the case, correct?

22 A. That's correct.

23 Q. Do you recall in that statement whether or not
24 Mr. McCulley stated under oath he operated a snowmobile in
25 the Town of North Elba and the Town of Keene?

1 A. I would have to look at that document.

2 Q. Okay. Better yet, why don't I give you this then.
3 This is Plaintiff's Exhibit Number 38, notice of intention
4 to offer statement, which is -- you know what it is, bein'
5 an attorney, what a seven ten thirty is. It's the
6 defendant's statement.

7 THE COURT: Is that in evidence?

8 MR. NORFOLK: Yes. Yes, your Honor.

9 Q. The seven ten thirty is the first page and behind
10 it is the voluntary statement, correct?

11 A. That would appear to be the case, yes.

12 Q. Okay. So, looking at that, does that refresh your
13 recollection of Mr. McCulley's statement?

14 A. I believe. The statement is not very good on this
15 copy.

16 Q. Okay.

17 A. Yes, it refreshes my recollection.

18 Q. Okay. Did Mr. McCulley state that he operated a
19 snowmobile in the Town of North Elba on the Old Mountain
20 Road?

21 A. It does say "I drove on the Old Mountain Road,
22 North Elba. At the end of the road is a parking lot." And
23 then it goes on to say he drove in as far -- let's see. "I
24 went in as far as the big beaver pond, then turned around
25 and came back out."

1 Q. Okay. That's his statement. If you flip to the
2 seven ten thirty that was issued, signed by Forest Ranger
3 LaPierre, correct?

4 A. Correct.

5 Q. That statement -- withdrawn. You -- the seven ten
6 thirty statement, what is it? What's a seven ten thirty
7 statement, in general?

8 A. Generally speaking, the prosecution in a case is
9 required to provide notice to the defendant and to the Court
10 as to any statements that the defendant made which will be
11 used by the People in the prosecution of that matter, the
12 charge against him.

13 Q. Okay. And that seven ten thirty statement says
14 that Jim McCulley stated he operated a snowmobile in the
15 Town of North Elba, correct?

16 A. It states -- the seven ten thirty statement says
17 you drove your -- I'm reading a portion of it. "You drove
18 your snowmobile on the Old Mountain Road, North Elba, into
19 Keene and back again."

20 Q. But that's -- yes, that's correct? You may
21 answer.

22 A. Yeah. It says North Elba, yeah.

23 Q. Who made the decision to file the action, whether
24 it's the ECAT, criminal summons, an information, in the
25 Town of Keene as opposed to the Town of North Elba?

1 A. I believe that it would have been -- it was Ranger
2 Costas who issued the ticket and I -- in discussions, it was
3 my understanding that the beaver pond that he went to, okay,
4 it was my understanding that that beaver pond was -- it was
5 clearly located in the Town of Keene. So, in other words,
6 it was an offense that took place --

7 THE COURT: No. The question was who made
8 the decision?

9 THE WITNESS: Who made that decision? That
10 decision, frankly, would have been made by the -- by the
11 forest ranger.

12 BY MR. NORFOLK:

13 Q. Okay. And my next question is what was the basis
14 for that decision?

15 A. The basis for the decision was that he drove to
16 the beaver pond and the beaver pond was located in the
17 Town of Keene.

18 Q. Okay. But he operated the snowmobile in the
19 Town of North Elba, too, correct?

20 A. Presumably, yeah. Yes.

21 Q. What's the difference between operating a
22 snowmobile in the Town of North Elba as operating in the
23 Town of Keene for purposes of the alleged violation?

24 A. It happened to be that the ticket was written in
25 the Town of Keene -- or the Town of Keene Court, but it

1 appear the violation, I guess, that occurred really
2 occurred -- those circumstances occurred in both
3 jurisdictions.

4 Q. Okay. All right. Now, was there any motion
5 practice in this proceeding? I think I may have asked that.
6 I don't recall. Was there any motion practice in this
7 proceeding?

8 A. There were repeated requests by myself to have the
9 Court issue summons.

10 Q. Okay. Sir, are you considering that motion --

11 A. Well, it was an informal letter.

12 Q. Right. But a motion usually has to do with notice
13 of motion, following procedures under the CPL, correct?

14 A. I hadn't gotten to that point.

15 Q. Okay.

16 A. So the answer is did I do a notice of motion and
17 motion and supporting affidavit or affirmation? No.

18 Q. Okay. When was the trial? I assume there was a
19 trial.

20 A. The trial was in -- my recollection was it was in
21 late August or early September of 2003. That's my
22 recollection on that matter.

23 Q. Okay. Now, the summer of 2003, June of 2003? I'm
24 not sure (unintelligible)?

25 A. Might have been -- it was during the summer. My

1 recollection was late summer sometime, but...

2 Q. Okay. Okay. You argued to the Town of Keene it
3 was a user road, correct?

4 A. It was a highway by use?

5 Q. Highway by use.

6 A. Yeah. Yes, I did.

7 Q. Okay. Highway by use is not a highway created by
8 statute, correct?

9 A. I would say that's probably correct, yes.

10 Q. You were victorious at the trial, meaning
11 Mr. McCulley got a conviction, correct?

12 A. Correct.

13 Q. How long did that trial last?

14 A. That trial was approximately three hours long.

15 Q. Okay. When did you get a decision from the Town
16 Court of Keene on that, on that matter?

17 A. I would say probably about a month after the trial
18 was over.

19 Q. Okay. And just yes, no, Mr. McCulley appealed it?

20 A. That's correct.

21 Q. Now --

22 (Pause in proceedings.)

23 Q. When were the appeal briefs, the Appellate briefs
24 submitted to the County Court?

25 A. I did not do the appeal in this matter.

1 Q. I understand that. Do you know when they were
2 submitted?

3 A. Frankly, I don't know. As I sit here right now, I
4 don't know what those dates were.

5 Q. Okay.

6 MR. MUNRO: Judge, I am wondering if we can
7 skip through some of the chronology and get to the
8 substance. I mean --

9 THE COURT: Well, I am not gonna tell him how
10 to do his direct, but...

11 MR. MUNRO: Okay.

12 BY MR. NORFOLK:

13 Q. Now, in 2005, Mr. McCulley was arrested --
14 withdrawn. Mr. McCulley was ticketed for operating his
15 pickup truck on the Old Mountain Road, correct?

16 A. That's correct.

17 Q. It was May 22, 2005?

18 A. I believe that's the date, yes.

19 Q. Okay. And what was the violation
20 (unintelligible)?

21 A. It was a violation -- the violation was a
22 violation of 6 NYCRR Section 196.1, which, in essence, is
23 the operation of a motor vehicle on forest preserve.

24 Q. What was the violation that he was issued for
25 operating a snowmobile on the Old Mountain Road in 2003?

1 A. 6 NYCRR Section 196.2, which is in the same area
2 of law, or regulations, I guess I should say, which is the
3 operation of a snowmobile on forest preserve.

4 Q. Okay. He was issued an ECAT, right, for the
5 May 22, 2005, event of operating a pickup truck on the Old
6 Mountain Road?

7 A. That's correct.

8 Q. Was that ECAT withdrawn?

9 A. Yes, it was.

10 Q. Whose decision was it to withdraw that?

11 A. It was ultimately the person who went to Court and
12 who did that was me.

13 Q. Okay. What was the basis for withdrawing that
14 ECAT?

15 A. The -- the basic reason was -- 'cause the basic
16 reason was it ultimately comes down to concern over burden
17 of proof. And the issues with respect to -- the issues with
18 respect to, you know, the things that have been discussed
19 here with the road and at a criminal matter, or a Justice
20 Court matter, we would have a burden of proof of proof
21 beyond a reasonable doubt, whereas an administrative
22 hearing, a department 622, we would have the burden of proof
23 by preponderance by the evidence.

24 Q. So your answer is -- when your answer is just --
25 you're explaining rescinding the ECAT and filing an

1 administrative court proceeding, correct?

2 A. What I did was the return date on the ticket that
3 was issued to Mr. McCulley, okay, was June 13th. Okay. I
4 appeared in court that night with the ticket -- or for the
5 return date, and I had gotten authority from the DA to
6 represent him, and I appeared with the notice of hearing
7 complaint. Mr. McCulley didn't appear. So, at that time, I
8 advised the Court, I think it was Judge Dietrich (phonetic),
9 that I was going to do -- the People were withdrawing the
10 ticket and then the following day I requested Mr. McCulley
11 be served.

12 Q. Did you have any discussions with anyone at the
13 department with respect to your decision to prosecute this
14 alleged violation administratively?

15 A. Yes.

16 Q. With who?

17 A. I had discussions primarily with Ken Hamm, who is
18 the attorney for the Bureau of Forest Preserve here in
19 Albany. Mike Lesser (phonetic), who is an attorney with our
20 Division of -- Office of Environmental Public Protection of
21 ECOs and our rangers. I discussed the matter with Stu
22 Buchanan, the regional director for Region 5, and with Rob
23 Davies who is the Director of the Division of Lands and
24 Forest for the New York State Department of Environmental
25 Conservation.

1 Q. Okay. And what was the reason to have
2 administrative enforcement proceeding? Is that because of
3 burden of proof?

4 A. Yes.

5 Q. Is that the only reason --

6 A. Well --

7 Q. -- discussed?

8 A. -- that was the -- that was the primary reason.

9 Q. Okay. What were the nonprimary reasons?

10 A. Well, one of the issues that we had was there had
11 been some confusion, we felt, in the public, with respect to
12 what exactly Judge Halloran's 27 page opinion had said. It
13 was basically, from my reading of Judge Halloran's decision,
14 was he basically indicated was that the People did not prove
15 their case in this -- in the prior matter, beyond a
16 reasonable doubt, and our fear -- one concern we had was if
17 we did this in Town Justice Court, there may be some
18 confusion with respect to them thinking that the issue --
19 the ruling closed the road, all right. And secondly, if we
20 prevail, we are going to end up with an appeal in front of
21 the Essex County Court.

22 Q. What's wrong with that?

23 A. Well, our concern was what was the best way of
24 going about it, and our feeling was if we went with an
25 administrative matter, there would -- we would --

1 administrative enforcement proceeding, under part 622 of our
2 regulations, that once that determination had been made, at
3 the end of the trial, and if Mr. McCulley -- that there
4 would always be the option, okay, if the -- we were able to
5 meet our burden of proof, the department staff were able to
6 meet their burden of proof, and establish that there was
7 a -- and establish that there was a violation of part 196.1,
8 that there would always be the option for Mr. McCulley to go
9 forward with an Article 78 proceeding against the
10 department.

11 Q. Now, you --

12 MR. MUNRO: I move to strike that response.

13 THE COURT: Sustained.

14 Q. You said --

15 THE COURT: Mr. Norfolk, you've done this a
16 couple times.

17 MR. NORFOLK: Okay.

18 THE COURT: Please refrain from those kinds
19 of comments.

20 MR. NORFOLK: Thanks, Judge. I will.

21 BY MR. NORFOLK:

22 Q. You said you didn't want to take it to County
23 Court. Were you -- did you purposely commence
24 administrative hearing not to be in County Court on appeal?

25 A. Well, I did it based upon -- I did it based upon

1 the evidence that was in front of me that Ranger LaPierre
2 had collected an appeal, recognizing what my various burdens
3 of proof were in a criminal and civil matter, and realizing
4 the higher degree of likelihood of prevailing in -- of
5 prevailing in establishing that there's been a violation of
6 part 196.1 was in an administrative action because of the
7 lower burden of proof.

8 Q. So you had a better chance of winning in an
9 administrative proceeding than in the Town of North Elba
10 Court?

11 A. I had a better -- lower standard of burden of
12 proof and given some of the issues with respect to this
13 road, that was the appropriate -- the appropriate forum to
14 handle the matter in.

15 Q. Do you think that this case is quite similar, the
16 case we're talking about, ridin' the pickup truck on the Old
17 Mountain Road --

18 A. Um-hum.

19 Q. -- is quite similar to the case of Jim drivin' on
20 the Old Mountain Road with his snowmobile?

21 A. There are some similarities, there are some
22 differences.

23 Q. Did you think that -- going back to the same
24 count -- County Court, perhaps on appeal, your chances of
25 winning were slim 'cause -- compared to an administrative

1 proceeding?

2 A. I had -- well, let's put it this way. My primary
3 folk discuss, okay, was the burden of proof. And I
4 expected, fully expected that many of the issues raised in
5 the first trial would be raised in -- frankly, raised in
6 this hearing, all right, would be raised again. And the
7 proceeding -- the administrative proceeding would be the
8 better way to go.

9 Q. It would favor your position?

10 A. It would be a lower burden of proof. It's
11 administrative as opposed to a criminal Justice Court
12 matter.

13 Q. No, I understand that. When you say "lower burden
14 of proof," that means it's easier for you, correct?

15 A. It's a lower burden of proof, yes.

16 Q. Okay. Now, and I apologize for my remarks
17 (unintelligible). While -- before the time you had your
18 conviction and then to the point where this appeal came out,
19 okay?

20 A. Correct.

21 Q. I want to talk about that time. You had some
22 other ongoings, other matters besides the Old Mountain Road,
23 other than Mr. McCulley and his snowmobile (unintelligible)?

24 A. That's correct.

25 Q. Okay.

1 MR. NORFOLK: I would like to offer into
2 evidence number (unintelligible.) Plaintiff's Exhibit
3 Number 63, which is Plaintiff's Number 15, on the -- on
4 these two exhibits list (unintelligible.)

5 THE COURT: Any objection?

6 MR. MUNRO: No objection, your Honor.

7 THE COURT: Plaintiff's Exhibit 63 is
8 received in evidence.

9 (Patient's Exhibit 63 received.)

10 BY MR. NORFOLK:

11 Q. Now, we had -- I am gonna ask you some questions
12 and unintelligible.

13 You had -- you had testified earlier that you
14 had argued that the Old Mountain Road was a user road,
15 correct?

16 A. That's correct.

17 Q. Now, can you tell me what I've given you is
18 Plaintiff's Exhibit Number 63?

19 A. It's actually two exhibits, but they're certainly
20 related. The cover is a letter dated December 22, 2004,
21 from me to Jim Brooks, who is the attorney -- who is the
22 attorney for Ken Jubin. And attached to it is a five-page
23 proposed order on consent for the resolution of a
24 violation -- an alleged violation against Mr. Jubin.

25 Q. Thank you. Can I see that for a second?

1 A. Sure.

2 Q. I want to direct you to certain things.

3 I am gonna direct you to number 7 of page 2
4 of the order on consent, proposed order on consent, if you
5 will. Ask you to take a minute and look at item number 7
6 and read that to the Court, if you will.

7 A. Okay. Number 7 says "the State of New York owns
8 lot 132, lot 140, 146, 148 of the Old Military Track, which
9 is located in the Town of North Elba."

10 Q. Okay. Now, on those lots, the Old Military Road,
11 which is referenced there, is that the first point nine or
12 after the point nine, if you know?

13 A. This is the -- basically -- this is basically --
14 this case deals -- understand, I'm writing in the context --

15 Q. That's not the question.

16 THE COURT: That's not the question,
17 Mr. Lacombe.

18 THE WITNESS: Okay.

19 THE COURT: What does it refer to? What
20 section --

21 THE WITNESS: I can't -- I'm not certain of
22 that, but I suspect what it refers to is the first point
23 nine miles.

24 Q. Okay.

25 A. (Unintelligible).

1 Q. Now point number 8 --

2 A. Yeah.

3 Q. -- can you read the first sentence and then what
4 I'll ask you to name the lots that are after. You don't
5 have to go through the deed and book and page number, okay?
6 Does that clarify?

7 A. Okay. "The State of New York owns five lots by
8 virtue of the following deeds recorded in the Essex County
9 Clerk's Office."

10 Q. Can you read the lots that follow that, please?

11 A. Yes. Lot 132, lot 140, 146, 153 and lot 154.

12 Q. Did you or someone, a member of your staff, do
13 some homework on this to get these deeds and book numbers,
14 record numbers? It appears so. Is that true?

15 A. I would have requested this information. I would
16 have requested this information from Les Eggleton
17 (phonetic), who is our real property supervisor for Region
18 5, the department.

19 Q. And would you have gotten that information -- I
20 mean documentation, these deeds?

21 A. I think I did. I'm not certain of that.

22 Q. Okay. Now, I ask you to read number 10, item
23 number 10, if you would?

24 A. Okay. "The Old Mountain Road, which is located in
25 the Town of North Elba, is a highway by use, which has been

1 in existence since the early part -- early part of the
2 1800s."

3 Q. Okay. At some point later in these proceedings,
4 with -- concerning Mr. Jubin, did you change your position
5 on that, that the Old Mountain Road wasn't a highway by use
6 but rather a statutory -- statutory created road?

7 A. No. However, there's been discussions about these
8 early 1800s statutes regarding the Old Mountain Road.

9 Q. Okay. Now, I would ask you to read number 11,
10 please, the -- of this order and consent. The -- I'm sorry,
11 number 11, item number 11.

12 A. Okay. Number 11, "The Old Mountain Road, which is
13 located in the Town of North Elba, traverses the forest
14 preserve lands on lots 132, lot 140, lot 146, lot 153 and
15 lot 154 as described in paragraph 5." It should be "8."

16 Q. You heard testimony today of Mr. Jubin, correct?
17 Were you here when he --

18 A. I heard it, yeah.

19 Q. Now, do you know -- I may have asked this. If
20 I've asked you this, forgive me and just tell me I've asked
21 ya.

22 A. Okay.

23 Q. You don't know, or do you, where -- which lot
24 Mr. McCulley operated his pickup truck on, do you, absent
25 from Ken -- hearing Ken today, but personally, from your own

1 (unintelligible)?

2 A. I would have to -- I would have to do specific
3 research on that particular point.

4 Q. Okay. Fair enough. Can I ask you to read number
5 12, please?

6 A. "Since the Old Mountain Road constituted a highway
7 by use, prior to the State of New York's acquisitions of lot
8 132, lot 140, lot 146, lot 153 and lot 154, in the Town of
9 North Elba has -- (Pause) -- Elba, has the right to a public
10 highway past the forest preserve lands, up to a width of
11 three rods (unintelligible)."

12 Q. Okay. When was this dated?

13 A. Well, I wrote the letter -- I wrote it in December
14 of 2000 -- December 22, 2004, so...

15 Q. Okay. Is there a date on the order and consent
16 (unintelligible)? No, there's no date.

17 A. No, no date.

18 Q. Now, who was the proposed sign -- signatories of
19 this? Who was gonna sign this? Obviously, you have Ken
20 Jubin or his attorney, but from the DEC?

21 A. I would send this on to Stu Buchanan.

22 Q. Okay. Can you refer to your last page?
23 There's -- who else -- here you have Erin Crotty, correct?

24 A. Yeah.

25 Q. But you may have had Stu sign for her?

1 A. Typically, Stu, Stu Buchanan, as the regional
2 director, has the authority to execute documents on behalf
3 of the Commissioner with respect to matters which involve
4 clearly some point of consent order.

5 Q. Okay. Can you show you what's been marked as
6 Plaintiff's Exhibit number 90? I'll take --

7 A. Yep.

8 Q. (Unintelligible). Can you find on there, on this
9 map, great lot 153 in the Town of North Elba?

10 A. Yeah.

11 Q. Okay. Now, is that great lot bordering the Town
12 of Keene boundry line?

13 A. Yeah. In this 1985 map, that would appear to be
14 the case.

15 Q. Okay. Now, just left of the 153 great lot, what
16 lot is that, if you can see?

17 A. It would appear to me to be lot 146.

18 Q. Okay. And the Old Mountain Road, as on here,
19 don't look at the highlighted, from your own -- that's
20 someone else -- but the lot that's on this map, the road
21 that's on this map, the trail markers, if you will, do they
22 intersect 153 and 146?

23 A. I'm not sure I understand the question.

24 Q. Does Old Mountain Road traverse through great lot
25 146 and great lot 153?

1 A. What appears on this 1985 map to be a road appears
2 to traverse lot 146 and lot 153.

3 Q. Thank you.

4 A. Yep.

5 Q. Thanks.

6 (Pause in proceedings.)

7 MR. NORFOLK: Excuse me, your Honor, I
8 apologize (unintelligible). I offer into evidence number --
9 Plaintiff's Exhibit Number 62 which is marked as 46 on the
10 exhibits list.

11 THE COURT: Any objection?

12 MR. MUNRO: No, your Honor.

13 THE COURT: Plaintiff's Exhibit 62 is
14 received in evidence.

15 (Plaintiff's Exhibit 62 received.)

16 BY MR. NORFOLK:

17 Q. Mr. Lacombe, I ask you to take a look at this and
18 I will ask you some questions about it. I apologize
19 (unintelligible).

20 (Pause in proceedings.)

21 THE COURT: While he's reading that, do you
22 have 63? The one he was just looking at.

23 MR. NORFOLK: Yes.

24 THE COURT: Thank you.

25 A. Okay.

1 Q. All set?

2 A. Yeah.

3 Q. Could you tell the Court what Plaintiff's Exhibit
4 Number -- I believe it's 62 is?

5 A. It's a five-page document. It's a letter I wrote,
6 dated November 5, 2004, from me to James Brooks, Esquire,
7 attorney for Ken Jubin.

8 Q. And prior to you drafting that letter, is it true
9 that Mr. Brooks perhaps gave his opinion that the Old
10 Mountain Road is a road created by statute?

11 A. Yes.

12 Q. And that's reflected in that letter, correct?

13 A. That -- I certainly responded to arguments that he
14 made with respect to that.

15 Q. Right. If you will, if you could read the last
16 sentence of the first paragraph and then number 1 -- I ask
17 you to read that and that would probably confirm what we're
18 talkin' about here.

19 A. Yeah. It says, "Mr. Brooks, the arguments that
20 you presented were as follows: Number one, Old Mountain
21 Road was created by chapter, what is that, 196," this is
22 Roman numerals --

23 Q. Yeah, I know?

24 A. -- "of the laws of New York, 35th Session, 1812.
25 Thus, it is a road created by statute, not by use."

1 Q. Okay. Now, in response -- you respond to that in
2 this letter, correct?

3 A. Yeah, I do.

4 Q. Could you read the number -- if you could flip it
5 back, I apologize, read that paragraph just kind of leading
6 sentence and then if you could read number one in response
7 to that argument?

8 A. Yeah. I write, "It is likely that Chapter C of
9 the laws of New York, 31st session, 1808, created what is
10 now known as the Old Mountain Road, and that Chapter 196
11 further describes the location of the road and appropriates
12 funds for improvement of the road."

13 Q. You argued something different, correct, in the
14 town court action against Mr. McCulley in 2003?

15 A. Yeah. This year -- this is written a year later
16 and I prefaced the comment by "likely."

17 Q. Okay. But you argued somethin' different,
18 correct, in the McCulley court?

19 A. The context of these two cases is very different.
20 They are dealing with the same road, but the issue in the
21 two cases are somewhat different.

22 Q. Okay. So, are you saying that some of the road
23 was created by user use -- some of the road is created by
24 statute?

25 A. I -- I have statutes in front of me that are not

1 entirely clear as to whether they created a road or not.
2 That's the issue.

3 (Pause in proceedings.)

4 Q. (Unintelligible.) Plaintiff's Exhibit 98, which
5 was already admitted in this court, which is the notice of
6 hearing -- copy of notice of hearing and the complaint of
7 administrative proceeding.

8 Do you state in here, if you will -- does it
9 state in there that the -- no motor vehicles are allowed in
10 the forest preserve, Sentinel Range Wilderness area?

11 A. I cite -- in -- not those exact words, but I
12 basically say that.

13 Q. Okay. Can I see this? Could you read Number 8?
14 Is that what you're referring to, Number 8? And if so,
15 could you read that?

16 A. No, that's not what the basis of my prior
17 response, but I'll read it.

18 Q. Okay.

19 A. "As a wilderness area in the Adirondack Park State
20 Master Plan, no motor vehicles are allowed in the Sentinel
21 Wilderness area."

22 Q. But according to you -- I'll withdraw that.

23 MR. NORFOLK: I reserve for redirect.

24 THE COURT: All right.

25 MR. NORFOLK: Do you want me to put that

1 exhibit back (unintelligible).

2 THE COURT: Please.

3 MR. MUNRO: Can we take a five-minute break,
4 your Honor?

5 THE COURT: We are takin' a lot of five
6 minute breaks here. What's goin' on?

7 MR. NORFOLK: I don't know. I
8 (unintelligible).

9 MR. MUNRO: We deferred to his last break
10 request, so --

11 THE COURT: Well, you had one before that,
12 too.

13 MR. NORFOLK: Mine was a restroom break.

14 THE COURT: All right. Five minutes. We're
15 waiting right here, though.

16 MR. MUNRO: Okay, fine, your Honor.

17 THE COURT: We have to move this along. We
18 can't take breaks every time we finish with a direct
19 examination or cross-examination.

20 MR. MUNRO: Five minutes.

21 THE COURT: We will wait right here.

22 MR. MUNRO: Thank you.

23 (Pause in proceedings.)

24 - - - - -

25

1 CROSS-EXAMINATION

2 BY MR. MUNRO:

3 Q. Mr. Lacombe, this has got to be every lawyers
4 worst nightmare, being on the rope.

5 I want to talk a little bit about Judge
6 Halloran's --

7 THE COURT: But not necessarily a bad
8 experience.

9 THE WITNESS: You're right about that, Judge.

10 THE COURT: That's right.

11 MR. MUNRO: Easy for me to say.

12 THE COURT: I've been there. It's not
13 comfortable --

14 THE WITNESS: Yeah.

15 THE COURT: -- but it's not a bad experience.

16 BY MR. MUNRO:

17 Q. I want to talk a little bit about the Judge
18 Halloran decision. What is your understanding as to what
19 the holding was of that decision?

20 A. My understanding of the decision was first that he
21 indicated -- or the Court indicated, I should say, that the
22 People, in their case, did not prove their case beyond a
23 reasonable doubt, in the criminal matter. And that we
24 hadn't -- there was reasonable doubt that existed with
25 respect to the issues of the abandonment of this road and,

1 therefore, that is why the conviction was reversed and
2 ultimately dismissed. That, in a gist -- in a nutshell is
3 pretty much the -- what he said, in a 26-page opinion.

4 Q. And what is your understanding as to what he said
5 about abandonment, whether the road had been abandoned?

6 A. He -- he cited a lot of -- actually, he had a lot
7 of facts which, from my reading of the case law, seems to
8 support the concept of just abandonment by law, but he came
9 to a different conclusion as to whether there was abandon --
10 or whether there was abandonment or not.

11 Q. And what conclusion had you and DEC arrived at, in
12 terms of whether the Jack Rabbit Trail, the Old Mountain
13 Road, had been abandoned?

14 A. Yeah. This 3.5 -- this 3.5 mile section of the
15 road, it was, from our observations, that the requirements
16 of Highway Law 205.1 had not been followed, but from reading
17 the case law, okay, that the procedural requirements had not
18 been followed. However, from reading the case law, there
19 seemed to be, at least across the Appellate Divisions, there
20 seemed to be less concern with the so-called ministerial
21 acts involved in a highway abandonment, in that
22 substantively, all the things that were needed to be there
23 for abandonment existed.

24 Q. You said that Judge Halloran made some findings of
25 fact that you believe supported abandonment. Can you be

1 more specific?

2 MR. NORFOLK: Objection.

3 THE COURT: Overruled.

4 A. Well, first -- you know, he cited to it in his
5 decision and I used it in the -- in the criminal trial, the
6 earlier trial, he said that the Essex County highway map
7 doesn't show this as a town road. He cited it in his
8 decision and I put it on in evidence that the Supervisor
9 states that no monies -- Supervisor, Town of Keene, no
10 monies had been used by the town since 1988, when he was in
11 office, to maintain this road. He cites in his decision and
12 he talks about the fact that there's -- this road, this
13 section of road is not on the town's inventory of road list,
14 which it gets federal and state money for. Those were some
15 of the things.

16 He talks about -- you know, he focuses on
17 that there's been private -- a private group has done the
18 maintenance and he talks about a few, a couple anecdotal
19 type of maintenance activities that the town -- excuse me,
20 that the town did in the late '80s and the early '90s, which
21 Mr. Reed sort of spoke about, but, for the most part, the
22 lion's share of all the work was done by the -- has been
23 done by this Adirondack Ski Trail (sic) Council.

24 He talks about the condition of the road and
25 how -- in which again there were a number of pictures that

1 went into evidence on that, and the finding -- but he talks
2 about how the road -- the trail is narrow, that there's four
3 or five beaver ponds in the middle of this road, you know,
4 how grass and trees have come in, have closed in on the
5 road.

6 And he also talks about how -- whether
7 certainly there's been use of the road, but the majority of
8 the use has been by cross-country skiers and snow shoers and
9 hikers and those things and, yet, you know, what I could
10 find was -- or the way I looked at it was that there were --
11 we had, you know, two, three, four anecdotal situations
12 where somebody had gone up there, quite some time ago, with
13 a -- whether it be a bulldozer or backhoe or a car or
14 whatever it was. And so he had all of these basically
15 findings in his ruling, which, from my mind, looking at the
16 Appellate Division case law across two, three, four of the
17 Appellate Divisions seemed to suggest those are the things
18 that Courts are looking at in whether there is abandonment.

19 The problem is is he came to -- the Court, in
20 that case, came to an opposite conclusion. But again, I had
21 the -- you know, in that case, I had the burden of proof or
22 the People had the burden of proof of proving the case
23 beyond a reasonable doubt. And so that's why I -- you know,
24 that's sort of how I looked at the decision.

25 Q. What is your understanding as to what needs to

1 happen for a road to be abandoned?

2 THE COURT: By use or by statute?

3 MR. MUNRO: By either.

4 A. That there's got to be -- by statute, generally
5 speaking, there's got to be non-use for a period of, I
6 believe it's six years. And then there's got to be a
7 certification, a resolution by the Town Board that that
8 needs to be done. And when that occurs, under 205.1 of the
9 Highway Law, you have abandonment.

10 And while it seems like the earlier case law,
11 and I'm talkin' back in the '40s and the '50s and '60s
12 seemed to focus on that, the more recent case law has said
13 we're not -- seems to say we're not lookin' at intent, we're
14 not lookin' at these ministerial actions, we're looking at
15 the substance, is this road really not being used? And --
16 and I think the cases, you know -- I'm pretty -- I feel --
17 it's not like one or two cases that are like that. There's
18 several cases that seem to have that same common thread or
19 pattern of reasoning.

20 Q. Now, when you say "not being used," not being used
21 in what manner?

22 A. Well, not being -- not being used regularly by
23 motor vehicle -- most of the cases were motor vehicle
24 traffic. And even most of the cases I looked at, the Daishe
25 case (phonetic) and I think there's a Pless (phonetic) case

1 and Suffolk case, they talk about these anecdotal type of
2 incidents where you have a truck go up there or somethin',
3 but for the long and short of it, that these things -- these
4 are used by pedestrians or they may be used by -- by hunters
5 or fishermen or things of that nature.

6 Q. Do you recall whether Judge Halloran stated how,
7 in his view, the state -- or what steps the state would have
8 to take to close this road? And again I'm talking about the
9 three-and-a-half miles, the Jack Rabbit Trail.

10 A. It seemed like he -- my read of that, it seemed
11 like he's indicated that really the only way that we could
12 close this road was by Highway Law 212, Section 212, which
13 is a statute which basically says that if you have a road
14 that goes through lands on both sides, goes through lands
15 owned by the state or any type of state agency, on both
16 sides, that the Commissioner of that particular agency has
17 the authority to close that road and what we call it in our
18 DEC lingo, we call it 212 order.

19 And he's -- basically what he said was that
20 that's the only way we can -- you can close a road and, you
21 know, we don't -- you know, there's nothing, in my mind,
22 reading the plain text of the statute, or plain meaning of
23 the statute, from the text, that indicates that that's the
24 case at all.

25 Q. So, is it your position that if DEC can prove that

1 a road is abandoned as you've described it, that DEC does
2 not need to issue a Highway Law 212 closure order?

3 A. That's correct.

4 Q. Did you want to appeal Judge Halloran's decision,
5 you personally, Chris Lacombe?

6 A. I believe that the Judge Halloran's decision was
7 incorrect and I was disappointed by it, but my job isn't
8 necessarily what my personal feelings are. My job is to
9 provided legal representation for the department. And
10 getting into the issue of an intermediate Appellate Court,
11 appealing to -- which was the Essex County Court, appealing
12 to the -- appealing to the Court of Appeals, I am not
13 well-versed in that topic, okay, and there were -- there
14 were fair -- and in that law. And there were -- you know,
15 there was a fair number of people that were not happy with
16 that decision -- within the department that were not happy
17 or were disappointed by that decision.

18 And so, what we did, when we got that ruling
19 of Judge Halloran's, was that myself, Ken Hamm from the
20 central office, and we worked with attorneys from the
21 Environmental Protection Unit at the AG's office and from
22 the Criminal Appeals Unit at the AG's office to look at what
23 our options were, whether we could appeal it.

24 Q. One second.

25 A. Sure.

1 Q. Is it true that the Criminal Appeals Bureau of the
2 Attorney General's office handled the appeal before Judge
3 Halloran?

4 A. That's correct.

5 Q. So, after his decision, there were discussions
6 within DEC and between DEC and the Attorney General's
7 office, is that correct?

8 A. That's correct.

9 Q. And tell us about those discussions.

10 A. Well, while there was -- there was a belief that
11 Judge Halloran's decision was incorrect in the sense that
12 his conclusion that the road was -- road was not abandoned
13 and we could prove our case from a reasonable doubt
14 standpoint, the problem was was that under CPL Section
15 490.50, I believe it is, that section deals with how you get
16 your case into the Court of Appeals.

17 And at the end of Judge Halloran's decision,
18 what it says is is that this matter is reversed and the case
19 is dismissed on the facts, on the law and in the interest of
20 justice. And this statutory section of the CPL basically
21 says -- says that all you can -- all you can appeal on are
22 issues of law. And while there was some debate about the
23 whole fact -- the dismissing on the facts, the thing that
24 made it -- and the recommendation that we were provided that
25 made it really legally not possible to appeal this matter to

1 the Court of Appeals was that the case had been dismissed in
2 the interest of justice. And because of that, that
3 recommendation from the criminal appeals unit, the
4 determination was made we're not going to appeal. And it
5 was a fair amount of disappointment. That was what the
6 result was, but that was what the law said.

7 Q. And again, the recommendation was from the
8 Criminal Appeals Unit of the Attorney General's office?

9 A. Correct.

10 Q. Do you remember who personally was involved?

11 A. Yes. I only talked with these people on the
12 phone, but the -- I believe the -- Robin Forshoff (phonetic)
13 was the person who actually handled the appeal in County
14 Court, was one of their attorneys, and we had a man on it
15 boy the name of Peter Pope (phonetic), I believe is his
16 name, who I believe is the -- maybe the head of that unit,
17 the criminal unit for the Attorney General's office. I
18 recall him saying, you know, when we were disappointed with
19 the recommendation, words to the effect, "Welcome. This is
20 the world that we live in," in terms of doing criminal work,
21 criminal appeal work and stuff as a prosecutor. And anyway,
22 to make a -- to make a long story short, that's who was
23 involved.

24 Q. So, no appeal was filed, no motion for leave to
25 appeal, no legal proceedings at all in the criminal case

1 after Judge Halloran's decision, is that correct?

2 A. That's correct.

3 Q. Let's move to 2005 now, after Mr. McCulley has
4 driven his pickup truck on the three-and-a-half mile section
5 of the Jack Rabbit Trail. You explained to Mr. Norfolk why
6 the criminal ticket that initially had been issued to
7 Mr. McCulley was withdrawn and that the decision was then
8 made to enforce administratively. And you mentioned three
9 or four, as I recall, lawyers within DEC's central office.
10 Can you give me those names again?

11 A. Yeah. Ken Hamm, who is the attorney for the
12 Bureau of the forest preserve. Mike Lesser, who is the
13 attorney with our Office of Public Protection, ECOs and
14 Rangers. Rob Davies, interestingly enough, who is our
15 Division Head for Lands and Forest, also happens to be an
16 attorney. And we actually had involved in those discussions
17 also attorneys from the AG's office.

18 Q. Does that include myself?

19 A. No. I don't believe you were involved. No.

20 Q. And for what period of time, approximately, did
21 these internal discussions go on, both within the DEC's
22 office and then between DEC and AG?

23 A. Well, the ticket was issued on March 23rd, I think
24 it was, and I appeared in court on June 13th. That was the
25 return date of the ticket. So it was about -- that's about

1 a six-week period of time, around six-, seven-week period of
2 time. And I would say that probably the discussions took
3 place for -- you know, as to how to handle it, you know,
4 took place for about a five-week period of time, and then
5 finally the decision was -- we looked at a lot of options,
6 but finally the decision was made that let's handle the
7 matter administratively.

8 Q. Okay. Were others at DEC involved, for example
9 the General Counsel or the Commissioner -- the Commissioner
10 has been sued as a defendant.

11 A. Yeah.

12 Q. -- to your knowledge?

13 A. Well, Stu Buchanan, our regional director, was
14 clearly involved. Not as hands on as I was, but I would go
15 in and I would certainly make him aware of the situation.
16 If there was an important call, we would discuss -- he would
17 be part of it, but he was involved. And while there were
18 some other names used, there -- I didn't deal directly with
19 these people, okay. That's a question you have to ask Ken
20 Hamm, 'cause he was in Albany, I was in Raybrook.

21 Q. When you say "these people," you mean others --

22 A. Others in the department, yeah.

23 Q. And could you give us just an approximate length
24 of time that these discussions took place? You said five
25 weeks. But was it a total of an hour, was it a total of

1 five hours, just approximately?

2 A. I'll -- it probably was, you know, it was
3 probably -- let's say, I don't know -- I'd say total it
4 was -- a lot of communications by e-mail, okay, but the
5 discussions were probably, I don't know, five to ten hours,
6 maybe that.

7 Q. Is it fair to say in your view that the decision
8 ultimately to proceed administratively was not met lightly?

9 A. No. No.

10 Q. Mr. Norfolk asked you questions about why you
11 proceeded administratively as opposed to criminally. Is it
12 your understanding that proceeding criminally to enforce
13 against the type of conduct that Mr. McCulley engaged in,
14 driving his pickup truck on a trail, is that the only
15 option, to proceed criminally?

16 A. No. I mean, quite often when -- the answer is no.
17 Administratively is -- probably 90 percent of the
18 enforcement matters that come to me are handled
19 administratively, okay. And I probably -- you know, I
20 probably resolve about 70 to 80 administrative cases a year.
21 So, certainly that -- administratively is a very common way
22 that we deal with, you know, air pollution issue, water
23 pollution, whatever. It's not as common, okay, it's not as
24 common as matters that come out of our Office of Public
25 Protection, which would be our forest rangers and ECOs,

1 'cause their officers, they write tickets. And, you know,
2 98 percent of these things I never see, okay. But there are
3 certain cases that come in, the officer knows that, you
4 know, I'm probably gonna end up in trial on it, or whatever,
5 it's just -- it's gonna, you know, be a tougher case, more
6 difficult case, and usually those are the types of cases I'm
7 gonna get a call on.

8 Q. When you looked into whether to proceed in this
9 matter administratively, did you find any law or regulation
10 that said, no, we can't handle this type of enforcement
11 proceeding administratively?

12 A. No. In fact, you look at 622, part 622 of our
13 regulations, subsection one indicates, you know, sort of the
14 scope. That's our enforcement mechanism, it's our
15 administrative enforcement proceeding. Basically says that
16 we can conduct enforcements on any violations of our
17 statutes or our regulations, I'm paraphrasing, but that
18 occur under that enforcement mechanism and that's what we're
19 using here, part 622 of our Code of Rules and Regulations.
20 There is no prohibition that we do it this way.

21 Q. You've already explained the regulation that DEC
22 staff is relying on in the administrative enforcement
23 proceeding, 196.1 of DEC regulations, is that correct?

24 A. Correct.

25 Q. What is the relief that's sought in the

1 administrative complaint?

2 A. One, a determination that there's been a violation
3 of part 196.1. Two, a civil penalty, albeit small, okay;
4 and three -- three, that an order that the respondent here,
5 Mr. McCulley, not do this anymore, not drive a motor vehicle
6 in a forest preserve. That's what we're focusing on. I
7 think it's what, \$100 penalty. I've got a hundred and a
8 five hundred. I sort of pled in the alternative. But, you
9 know, I think the Article 9 penalty provision allows for
10 civil penalty for that particular violation of up to \$100.

11 Q. Okay. Can you explain briefly how the
12 administrative process works? There's already been a
13 mention about DEC staff bringing the administrative
14 proceeding. What does that mean?

15 A. Well, bringing an enforcement proceeding, what I
16 do is I -- generally what I'll do is I will issue a notice
17 of hearing, sort of something similar to a summons in our
18 world, and a complaint. At that point, I'll get an answer,
19 okay, and I've got that here.

20 Q. In other words, Mr. McCulley has answered this
21 particular --

22 A. That's right. Okay. Admit, deny, raise
23 affirmative defenses, et cetera. And then you go through --
24 there's opportunity for discovery, there's opportunity for
25 motions before an administrative law judge.

1 When you get through that process, you file a
2 notice of readiness and you have an administrative -- the
3 judge will schedule an administrative hearing. The
4 administrative hearing, more often than not, is usually held
5 in the town or the DEC office closest to where that
6 violation occurred. And -- alleged violation occurred. And
7 then you go to put on your case.

8 I have the burden of proof, I have to put on
9 my witnesses, right to cross-examination, defendant gets to
10 put his case on. We make -- usually we make written
11 argument to the judge. The judge will then issue a report
12 of findings, recommended report of findings, and that will
13 be then forwarded to the Commissioner. And she, in this
14 case, would have the right to accept the recommendations of
15 the administrative law judge, not recommend them or modify
16 them in some way. And once that's done, you can finalize
17 the action, and if the respondent didn't prevail, he or she
18 would have the right to file an Article 78.

19 Q. If the DEC staff, and in this particular case you
20 and your staff, were not able to prove the allegations in
21 the administrative enforcement complaint, then the DEC
22 Commissioner could rule against you, is that correct?

23 A. That's correct.

24 Q. And presumably, there are instances when the DEC
25 Commissioner is not fully agreeing with the reports from the

1 administrative law judges; is that correct?

2 A. I -- I don't get involved in that. That's --
3 thankfully, that's never happened to me, okay, in one of my
4 cases. But I'm sure that -- I suspect that there are some
5 circumstances like that.

6 Q. Okay. I wanted to switch for a minute to this
7 State Land Master Plan because there has been some
8 discussion about this, but I would like to get some exhibits
9 to offer them into evidence.

10 MR. MUNRO: These are on my list, your Honor.
11 And Mr. Norfolk has been given a copy of these reports.

12 THE COURT: What are the numbers?

13 MR. MUNRO: They are numbers 7 through 10.

14 BY MR. MUNRO:

15 Q. Chris, can you take a minute to just look through
16 each of these exhibits?

17 THE COURT: Is there any objection?

18 MR. NORFOLK: No, your Honor.

19 THE COURT: Defendant's Exhibits 7, 8, 9 and
20 10 are received in evidence.

21 (Defendant's Exhibits 7 through 10 received.)

22 (Pause in proceedings.)

23 A. Okay.

24 Q. Can you tell us, first of all, what is the State
25 Land Master Plan?

1 A. Well, it's a plan that DEC is required -- was
2 required to prepare, in consultation with the Adirondack
3 Park Agency, and actually the two agencies are required to
4 work together under Executive Law Section 816. I believe
5 back in the early '70s, when the first Master Plan was
6 prepared, I think the law was Executive Law Section 807.

7 But what it basically does is it requires
8 that the directive -- the statute directed that a Master
9 Plan be developed as a -- and, basically, it takes on the
10 court of law -- in the court of law, as to how the
11 development -- what will be the acceptable development on
12 state lands -- or not development, but uses on state land
13 within the Adirondack Park.

14 Q. Okay. Can you take a look at Exhibit 7, please --

15 A. Yeah.

16 Q. -- and tell us what that is?

17 A. Exhibit 7 appears to be the first State Land
18 Master Plan, which was enacted in June 1st of 1972.

19 Q. Okay. And please keep explaining the documents to
20 the --

21 A. And on the second page, there is a letter from
22 then Governor -- well, Governor Rockefeller, at that time,
23 dated July of '72, indicating that -- to the Chairman of the
24 Adirondack Park Agency, indicating that the Governor has
25 approved the State Land Master Plan pursuant to Executive

1 Law 807.

2 And, you know, obviously the third page of
3 Defendant's Exhibit 7, I believe it is, yeah, is a table of
4 contents. And you know, within the State Land Master Plan
5 at that time, you know, there was a half a dozen or so
6 different classifications of property, of lands that the
7 state owns. And those documents are listed in left-hand
8 column. Basically wilderness, primitive, canoe, wild
9 forest, intents of use, wild, scenic and recreational rivers
10 and travel corridors. Those were the different types of
11 classifications. And if a property got designated within
12 that classification, there were certain requirements that
13 that property or that that state property had to meet and
14 limitations on the use of that property.

15 Going to the next page, which is page, I
16 guess -- well, it's the page with the 8 in the lower
17 left-hand corner, it has the definition of what the
18 wilderness -- what wilderness land is in the -- under the
19 Adirondack State Land Master Plan. And this happens to be
20 the classification or the designation for the Sentinel
21 Mountain Wilderness area.

22 Q. Within which the three-and-a-half mile portion of
23 the Jack Rabbit Trail/Old Mountain Road we're talking about
24 is in --

25 A. That's correct.

1 Q. -- is that correct?

2 A. And if you go to the last page of People -- or
3 Defendant's Exhibit 7, you have the excerpt that addresses
4 the Sentinel Range Wilderness area. And of course, this
5 was -- this particular document was prepared in 1972, and
6 under the Master Plan, there are certain things that --
7 certain things that were existing in those units at that
8 time, or those areas at that time, that were not conforming
9 with the Master -- yeah, with the requirements of the Master
10 Plan. And because this is a wilderness area, motor vehicle
11 usage is prohibited -- is prohibited.

12 And if you look at the last page of
13 Defendant's Exhibit 7, you'll see that in the Sentinel
14 Range Wilderness, at -- in 1972, there was snow -- one of
15 the nonconforming uses was a snowmobile trail that was
16 3.5 miles. And there was also a Jeep trail that was point
17 seven miles. Those were nonconforming uses at that time.

18 Q. And we don't know whether that reference to the
19 snowmobile trail of three-and-a-half miles is the
20 three-and-a-half mile trail we are talking about now, do we?

21 A. No. No, we don't.

22 Q. But it could be?

23 A. It could be.

24 Q. Okay. Let's move on to the other exhibits and you
25 can skip --

1 A. Sure.

2 Q. -- past the cover pages.

3 A. Yeah.

4 Q. Just give us the year and the references to the
5 three-and-a-half mile trail.

6 A. Defendant's Exhibit 8 is the 1979 version of the
7 State Land Master Plan. From time to time, the legislative
8 enactment indicated that this thing needs to be updated.
9 And the long -- as you go through here, and you get to the
10 fourth or fifth page, where it says "area descriptions and
11 delineations," you get into the wilderness areas again. And
12 on the following page, or the next to last page of the
13 exhibit, with a 45 in the lower right-hand corner, we deal
14 with the Sentinel Range Wilderness area, okay. And at that
15 point, you'll see that on the very last page, you'll see the
16 Sentinel -- in the lower left-hand corner, you'll see the
17 Sentinel Range area statistics, and you'll see nonconforming
18 uses, you'll see Jeep trail, 3.5 miles. But above that --

19 Q. What page are we talking about?

20 A. We're -- it's on the last page.

21 Q. Is there a page number?

22 A. Of defendants' -- yeah, it's page 46 in the lower
23 left-hand corner, okay? And in the paragraph above that,
24 okay, it's -- it states "the Jeep trail, which was seven --
25 point seven miles in length has been closed. There are two

1 tent platforms that have been removed from the area, and the
2 only remaining nonconforming use includes the Old Military
3 Road, a former town road, 3.5 miles in length, which is not
4 generally passable to motorized vehicles but which has not
5 yet been appropriately barricaded as required by the
6 wilderness guidelines."

7 Q. And is it your understanding that that reference
8 is to the three-and-a-half mile trail that's at issue in
9 this proceeding?

10 A. Yeah.

11 Q. Okay. If we could then move on to the 1987
12 amendment and if you could just go to the page that --

13 A. Sure.

14 Q. -- addresses the trail.

15 A. Yep. On the fifth page of the document, it's got
16 a number 15 at the bottom. Actually, I take -- I take that
17 back. On the last page of the document. It's got a number
18 51 at the bottom. Again, we have a wilderness area, we go
19 to the Sentinel range, and in the 1970 -- or 1987 version of
20 this State Land Master Plan, again, we -- under
21 nonconforming uses, we have none.

22 And in the paragraph above that area, on that
23 last page, that says Sentinel Range area statistics, it says
24 "the Jeep trail, point zero seven miles in length, has been
25 closed and two platforms a have been removed from the area.

1 The Old Mountain Road, a former town road, 3.5 miles in
2 length, has been closed and the area now fully conforms to
3 the wilderness standards."

4 Q. And again, it's your understanding that the
5 reference to the 3.5 mile road is the three-and-a-half mile
6 trail that we have been talking about here?

7 A. That's correct.

8 Q. And again, just to move this along, let's move to
9 the last document and a reference to the three-and-a-half
10 mile trail.

11 A. Yeah. And again, we -- Defendant's Exhibit 10, I
12 go to the next to last page, it's got 65 at the bottom, that
13 starts the area for the Sentinel Range Wilderness. And if
14 you -- this is -- this is the Master Plan document for --
15 that was approved in 2001, okay. And then, for the Sentinel
16 Range area statistics, the nonconforming use is none. And
17 it basically reiterates, states the same thing in the
18 paragraph above that was in the 1987 Master Plan.

19 Q. Okay.

20 MR. MUNRO: Your Honor, I was not able to get
21 complete copies of the Master Plans prior to the 2001, which
22 is the current one. The Adirondack Park Agency made me
23 copies of the pages that were in evidence, but if you would
24 like, we do have a complete copy of the 2001, the current
25 Master Plan, if you just wanted to see what an entire Master

1 Plan looks like.

2 THE COURT: If I need it, I'll let you know.

3 MR. MUNRO: Okay.

4 THE COURT: Thank you.

5 MR. NORFOLK: If I may, I would agree to have
6 it into evidence. That was one of my things I would like to
7 have in evidence. I have a copy, too.

8 MR. MUNRO: Yeah.

9 MR. NORFOLK: I offer it in.

10 THE COURT: It's up to you.

11 MR. NORFOLK: Okay.

12 MR. MUNRO: Well, I'll offer it in as
13 evidence.

14 THE COURT: What's the number?

15 MR. MUNRO: This will be Number 11,
16 Defendant's Number 11.

17 THE COURT: All right. Received without
18 objection.

19 (Defendant's Exhibit 11 received.)

20 BY MR. MUNRO:

21 Q. I just have a few more questions.

22 A. Okay.

23 Q. Chris, do you believe that the DEC enforcement
24 process, as you've described it, will be biased against
25 Mr. McCulley?

1 A. No.

2 Q. In your view, did DEC decide to file an
3 administrative enforcement complaint against Mr. McCulley to
4 retaliate against him in any manner?

5 A. No.

6 Q. Did they decide to file an administrative
7 enforcement complaint to restrain his First Amendment right
8 of freedom of speech or expression?

9 A. No. No.

10 Q. Did they do so to seek to harass him?

11 A. No.

12 Q. Did they file an administrative enforcement
13 complaint to seek to oppress or punish him?

14 A. No. I mean, certainly there's a penalty that we
15 are seeking, which has a punitive aspect to it in the
16 hearing, if we prove our case. But the whole purpose of it
17 is not to punish him or retaliate against him.

18 Q. Thanks for that clarification.

19 A. Okay.

20 Q. Do you believe that the regulation upon which
21 DEC's enforcement proceeding's based, 196.1, to be legally
22 valid?

23 MR. NORFOLK: Object.

24 THE COURT: Overruled.

25 A. Yes. I think that the -- it was properly

1 promulgated and, you know, the case law that I've reviewed
2 on it, the Court of Appeals level, I mean, I'm speaking
3 generally, is administrative regulations, promulgated by
4 agencies, that are consistent with the purpose of the
5 statute that authorizes the promulgation, are legal.

6 In this case, I mean, purposely, one of the
7 major purposes in Article 1 of the Environmental
8 Conservation Law is the protection of the forest preserves
9 and in Article 9 is protection of forest preserve and
10 clearly 196.1, dealing with motor vehicles, the purpose of
11 that regulation is to protect the forest preserve. I think
12 there's a rational basis for that.

13 Q. To your knowledge, did DEC commence its
14 administrative enforcement action based on the request or
15 the wishes of any environmental group?

16 A. No.

17 Q. Based on the requests or the wishes of the
18 Adirondack Ski Touring Council?

19 A. No.

20 Q. Any other outside group?

21 A. No.

22 Q. Do you believe that DEC is selectively prosecuting
23 its regulations against Mr. McCulley?

24 A. No, it's not.

25 Q. Do you believe that DEC is seeking to violate his

1 due process rights?

2 A. No.

3 Q. Do you believe that DEC is seeking to violate his
4 right to equal protection under the laws?

5 A. No, I don't.

6 MR. MUNRO: Thank you. I have nothing
7 further, your Honor.

8 THE COURT: Any redirect?

9 MR. NORFOLK: I do, Judge. But do you have
10 to leave?

11 THE COURT: No.

12 MR. NORFOLK: Remember yesterday --

13 THE COURT: Go ahead.

14 MR. NORFOLK: Just go ahead?

15 REDIRECT-EXAMINATION

16 BY MR. NORFOLK:

17 Q. You discussed, Mr. Lacombe, on cross-examination,
18 Highway Law 212?

19 A. Yeah.

20 Q. Has the DEC taken any steps to abandon the Old
21 Mountain Road in terms of Highway Law 212?

22 A. No. At this point, no.

23 Q. Are you aware of any -- a letter which was put
24 into evidence from the DEC to one of the towns, either
25 Town of Keene or Town of North Elba, concerning Highway

1 Law 212?

2 A. Let me see it.

3 MR. NORFOLK: It's Plaintiff's Exhibit 2,
4 your Honor. It was put into evidence.

5 MR. MUNRO: Can you just describe what that
6 exhibit is?

7 THE WITNESS: Want me to?

8 MR. MUNRO: Yeah.

9 THE WITNESS: Plaintiff's Exhibit 2 is a
10 letter dated March 1, 1978, from Phil Capone, Phillip
11 Capone, our acting regional forester, to Robert Purdy, who
12 was the Supervisor of the Town of Keene.

13 BY MR. NORFOLK:

14 Q. And what's -- tell the Court what's on the back
15 (unintelligible).

16 A. It's a two-page exhibit. And the second page
17 is -- would appear to be some type of description that was
18 prepared and it's entitled -- it's entitled "Old Mountain
19 Road," and it appears to be a description of the road.

20 THE COURT: What do you want to ask him about
21 this document?

22 Q. Okay. I ask you to read the last paragraph. I am
23 gonna ask you if you agree with that statement, the last
24 paragraph. You can read it outloud, I'm sorry.

25 A. It states -- all right. Presumably Mr. Capone

1 stated, "DEC requests" --

2 Q. I'm sorry, the last -- second to the last.

3 A. Okay. Again, he requests "abandonment can be
4 accomplished by the town through Section 205 of the Highway
5 Law, or since the land on both sides of the road is state
6 land and the road terminates on state land, the state can
7 initiate abandonment pursuant to Section 212 of the Highway
8 Law."

9 Q. Do you agree with that statement?

10 A. That -- those would be certainly two options, yes.

11 Q. Okay. Again, DEC, they did not take any steps for
12 212 abandonment, correct?

13 A. No.

14 Q. To abandon the Old Mountain Road.

15 You also mentioned that a town road can be
16 closed by a town, you said you did some kind of
17 certification filing, is that correct, to close the road?

18 A. Well, I mean, there's -- under 205, I mean,
19 there's a process that you can go through to close a road.

20 Q. And you -- I think you testified on
21 cross-examination that part of that is filing some kind of
22 certificate?

23 A. I mean -- my recollection, you gotta go through --
24 you've got to go through a resolution, public hearing notice
25 and so on and so forth, and I think probably at the end of

1 that, some type of resolution or certification of
2 abandonment.

3 Q. Does that have to be filed with the state or
4 something?

5 A. I would have to --

6 Q. Your understanding?

7 A. My recollection -- I'd have to read the statute
8 closely again. But, generally speaking, that's the process,
9 and I assume it probably has to be filed with somebody, but
10 I'm not sure who that is with.

11 Q. Do you know if the Town of Keene and/or the Town
12 of North Elba have taken any steps to pass a resolution
13 certification to close the road and file it with the state
14 or any other agency?

15 A. Well, I mean, I became aware, sometime in June of
16 this year, okay, June of this year, 2005, that apparently
17 the Town of Keene did a qualified abandonment of the Old
18 Mountain Road.

19 Q. Within their read?

20 A. Yeah, within their section.

21 Q. And that was June of this year, 2005?

22 A. I think that was it, yeah.

23 Q. Okay. You mentioned that -- in testimony on
24 cross-examination that you don't -- it's not as common that
25 you would do administrative proceedings for, I think you

1 mentioned enforcement type -- you used a special term,
2 enforcement type of allegations, maybe like motorized
3 vehicles in a forest preserve? Is that one of these that
4 would fit into that category?

5 A. I -- I don't know how to say -- it's not that
6 uncommon -- it's not that common for me to do administrative
7 enforcement cases or to represent our ECOs in law
8 enforcement -- in cases, okay.

9 Q. Um-hum.

10 A. The vast majority of my cases come from our
11 technical staff members, our engineers and our biologists.
12 However, I am a regional attorney for the entire region and
13 there are certain cases, okay, that do come in where the ECO
14 or the ranger has requested assistance and I'll go through
15 the process if I'm giving 'em that assistance.

16 Q. Right.

17 A. Okay.

18 Q. I understand. Okay. You do a FOIL response -- I
19 say you, department generated some printouts of violations
20 regarding 196, part 196, and -- 196.1 and 196.2, which are
21 operating a snowmobile in the forest preserve, which I think
22 is 196.2, and operator a truck on the foster preserve which
23 is 196.1?

24 A. Yep.

25 Q. Now, this goes to something you were commenting on

1 on cross-examination.

2 MR. NORFOLK: And I would ask that I have
3 these put into evidence, Plaintiff's Exhibit Number 85, they
4 are two different (unintelligible), 196.1 --

5 THE COURT: What's the old number?

6 MR. NORFOLK: I have 'em separately --
7 they're both 2 and 3, but I have 'em as one exhibit, 'cause
8 they're relatively the same, but Number 2 and 3 on the first
9 page of the exhibits list.

10 MR. MUNRO: These are DEC records?

11 MR. NORFOLK: That's correct.

12 THE COURT: Any objection?

13 MR. MUNRO: No, your Honor.

14 THE COURT: Plaintiff's Exhibit 85 is
15 received in evidence.

16 (Plaintiff's Exhibit 85 received.)

17 BY MR. NORFOLK:

18 Q. You've seen these before, correct?

19 A. Yes, I have.

20 Q. Okay. How long have you been a regional attorney
21 at DEC?

22 A. Since November --

23 THE COURT: It's already in the record.

24 Q. I know. All right. Okay.

25 A. Nine years.

1 Q. Thank you. I -- the reason I --

2 THE COURT: Don't give us -- just ask your
3 question.

4 Q. Okay. Now for nine years, how many times in your
5 nine years have you prosecuted a violation of part 196 in
6 administrative proceeding?

7 A. Certainly at a hearing, my answer would be zero,
8 okay. I -- I'm not sure -- I've done a few -- well, my
9 answer would be zero. I've done a few -- I think I've done
10 a few administrative cases involving motor vehicles which
11 have resolved through a consent order.

12 Q. Through part 196?

13 A. Probably not --

14 Q. Okay.

15 A. -- okay. But there's two or three different
16 regulations or statutes that you can deal with motor vehicles
17 on, and -- on forest preserve and this would be -- I can't
18 say -- I haven't done any administrative enforcement
19 hearings under 196.1.

20 Q. Okay. Can I ask you to read to the Court what
21 this first page of Plaintiff's Exhibit Number 85 is?

22 A. Okay.

23 Q. (Unintelligible.)

24 A. Okay. This is a -- the first page of Plaintiff's
25 Exhibit 85 is a computer-generated document that I requested

1 from our Office of Public Protection in Albany. It only
2 involves --

3 THE COURT: What's it say?

4 THE WITNESS: I'm sorry. It's basically --
5 it states that -- it provides a statistical number of ECATs
6 issued for violations of 196.1 and how they were disposed,
7 okay. And the number of ECATs issued for that violation --
8 let me back up. And this is by our Environmental
9 Conservation Officers in Region 5, the eight county region
10 of Region 5.

11 THE COURT: For what period of time?

12 THE WITNESS: From 19 -- it's actually been
13 knocked out here with a hole punch, but I think it was
14 January 1, 1988, until November 30, 2005. Okay? And again,
15 this is only law enforcement, not our rangers.

16 Q. So there could be more?

17 A. Well, I gave you --

18 THE COURT: What does it say?

19 THE WITNESS: Okay. All right. It says
20 130 -- excuse me, a hundred sixty ECATs were issued, a
21 hundred thirty-seven of them were disposed of, a hundred and
22 twenty three of 'em resulted in convictions, one was
23 forwarded -- I'm not sure what that means. Okay. The
24 conviction rate was 90.51 percent and the amount of fines
25 that were covered was \$5,225 and the jail sentences were

1 zero days.

2 Q. How many (unintelligible) prosecuted
3 administratively?

4 A. These -- none of these. These would have been
5 done in Justice Court, I assume.

6 Q. Okay. (Unintelligible) of Plaintiff's Exhibit --

7 A. Yeah.

8 Q. Same thing if --

9 A. Yeah. The second page is for the same period of
10 time, for the same region, for violations of 196.2. All
11 right?

12 Q. Um-hum.

13 A. And there have been 42 ECATs issued, 40 disposed
14 of, zero forwarded, 35 convictions, a conviction rate of
15 89.74 percent and \$1,640 in fines or penalties and zero
16 sentenced days, jail sentence days.

17 Q. (Unintelligible)?

18 A. None, because this is criminal.

19 MR. NORFOLK: I would like to offer into
20 evidence Plaintiff's Exhibit Number 65, which is Number 4 on
21 the exhibits list and what this is -- well.

22 MR. MUNRO: It's another DEC document, right?

23 MR. NORFOLK: Yeah.

24 THE COURT: Any objection?

25 MR. MUNRO: No, your Honor.

1 THE COURT: Plaintiff's Exhibit 65 is
2 received in evidence.

3 (Plaintiff's Exhibit 65 received.)

4 BY MR. NORFOLK:

5 Q. Now I want, just to clarify for the Court, I would
6 like to ask you one question and say what that is and I will
7 put it over here.

8 A. This is -- this is the -- a more detailed
9 report that was generated in response to a FOIL request you
10 made for the tickets written from January 1, 1988, to
11 December 31, 2005, of all -- the tickets written in Region 5
12 for violations of 196.1, 196.2, by both our ECOs and our
13 forest rangers. Okay? All right.

14 Q. That's all I (unintelligible).

15 A. Okay.

16 Q. On cross-examination, you testified that there was
17 certain individuals from the DEC who would discuss how to
18 proceed, whether administratively or not --

19 A. Yeah.

20 Q. -- with Mr. McCulley's latest charge in '05,
21 and -- is that correct?

22 A. Yeah, that's true.

23 Q. Okay. And a question came from Commissioner
24 Crotty or Commissioner -- I think was, I believe, Sheehan in
25 '05, correct?

1 A. Right now, we have Commissioner Sheehan. We --
2 I'm not sure the exact date she left, but Commissioner
3 Crotty, I think, left sometime in the spring of 2005. I'm
4 not sure of the exact date. I never have had discussions
5 with either of them about this case.

6 Q. Okay. But is it safe to say they supervised and
7 overlooked yourself, Mr. Buchanan and Robert Davies? Is it
8 Robert Davies?

9 A. I report and I work for Stu Buchanan, the regional
10 director. That is who I report to in our thing. You could
11 say that maybe I -- well, the Commissioner is the
12 Commissioner.

13 Q. Right.

14 A. But in my chain of command, the person I report to
15 is Stu Buchanan.

16 Q. Okay. Does Stu Buchanan, does he report to the
17 Commissioners?

18 A. Yes.

19 Q. And answers to the Commissioners if and when
20 necessary?

21 A. Yeah.

22 Q. Okay. Going to -- you discussed the process of
23 the administrative enforcement proceeding and what's
24 involved in it. The administrative judge, how is he or she
25 picked?

1 A. There is a separate office in the Department of
2 Environmental Conservation that is called our Office of
3 Hearings and Mediation, and there's probably 10
4 Administrative Law Judges in that office. They are separate
5 and apart from our -- from our people -- or excuse me, the
6 department staff. And they -- you know, we're not supposed
7 to have ex parte communications with 'em and they're a
8 separate thing. They preside as the administrative judge in
9 the case.

10 Q. Okay. And are they DEC employees?

11 A. Yes.

12 Q. Are they paid by the state?

13 A. Yes.

14 Q. In the administrative proceeding, is it mandatory
15 or guaranteed that the defendant, or the respondent, will
16 have an opportunity to discovery under the rules?

17 A. Yes. In fact, the rules of the CPLR --CPLR apply.

18 Q. Doesn't the respondent have to make a motion first
19 or request for discovery before discovery is allowed in an
20 administrative proceeding?

21 A. I'd have to look at -- I don't think that's the
22 case, but I'd have to look specifically at the regulation.

23 Q. Under the rules and regulations encompassing
24 your -- this administrative proceeding that's involved
25 here --

1 A. Right.

2 Q. -- (unintelligible), is Mr. McCulley to bring each
3 and every claim he has brought in this federal claim in that
4 administrative proceeding?

5 A. The administrative proceeding would be an
6 administrative prosecution of a violation of 196.1 of the
7 Code of Rules and Regulations. You have, in -- Mr. McCulley
8 has, in his answer, raised a number of affirmative defenses.
9 And in my mind, those are -- those would be fair game in an
10 administrative hearing. I'm gonna have to deal with 'em.

11 Q. But they're not claims, correct, causes of action;
12 they're defenses?

13 A. That's correct.

14 Q. Can Mr. McCulley or any respondent in this
15 administrative proceeding or anything like it now state --
16 seek injunctive relief, monetary relief, equitable relief in
17 this administrative proceeding, seek it -- but let me add on
18 to that, if you don't mind, and actually obtain it to some
19 kind of adjudication at this administrative proceeding?

20 A. I suppose on a discovery type of issue, if he made
21 a motion to the judge, the judge could order us to do
22 certain things.

23 Q. (Unintelligible)?

24 A. Yeah. I mean there's a lot of different types
25 of --

1 Q. Relief. Bad question.

2 A. Okay.

3 Q. Can he seek and obtain through adjudication at
4 this administrative proceeding exact same damages that he
5 has sought at this federal court proceeding?

6 A. In the administrative proceeding -- damages, no,
7 he wouldn't be able to collect damages.

8 Q. Damages, the relief he's requesting here?

9 A. Well, I mean, penalties or attorneys fees, no, I
10 don't think he would be -- no, he wouldn't be able to get
11 that at an administrative proceeding.

12 MR. NORFOLK: I have a copy, Judge, of what
13 was just entered into evidence, the State Master Plan. I
14 would like to read off myself so that you could give
15 Mr. Lacombe the -- your exhibit.

16 MR. MUNRO: The only other copy I have --

17 THE COURT: Miss Mezoff has it. It's in
18 evidence.

19 MR. NORFOLK: Okay. So, we'll do
20 (unintelligible).

21 MR. MUNRO: Well, here, you can --

22 A. Here, give me...

23 (Pause in proceedings.)

24 Q. Now, if you could turn to the page of
25 wilderness -- Sentinel Range Wilderness area, I think that's

1 on page --

2 MR. MUNRO: 68.

3 MR. NORFOLK: Thank you.

4 MR. MUNRO: Around there.

5 MR. NORFOLK: I have 65.

6 A. Okay. Sentinel Mountain Wilderness area. Yep,
7 here we are.

8 Q. You've already gone through --

9 THE COURT: What's your question?

10 Q. The former road, town road, has been closed since
11 1987 according to the Master Plan?

12 A. Yeah. Yeah.

13 Q. The Old Mountain Road has been closed, according
14 to the Master Plan --

15 A. That's what the Master Plan states, yes.

16 Q. Why did the DEC consider the road to be -- the Old
17 Mountain Road to be a town highway under the jurisdiction of
18 the town after '87?

19 A. The first nine-tenths of a mile in North Elba is a
20 town highway. It's the 3.5 miles from the turn-around to
21 the Rockin' River down in Keene that's not town road.

22 Q. Okay. But there is -- there's in evidence --
23 did you hear that there was letters been in evidence
24 regarding activities in the Town of Keene on the Old
25 Mountain Road?

1 A. I don't know if I understand the question.

2 (Pause in proceedings.)

3 BY MR. NORFOLK:

4 Q. (Unintelligible). According to the State Master
5 Plan, the wilderness area is supposed to have no
6 nonconforming uses, is that correct?

7 A. Yes. But -- but, you know, that's what the goal
8 is, okay. That's what the law says. But -- and I can't
9 tell you about every wilderness area, but I would imagine
10 there may still be some wilderness areas --

11 THE COURT: I think you've answered the
12 question.

13 THE WITNESS: Okay. All right.

14 BY MR. NORFOLK:

15 Q. You know the Bartlett Road?

16 A. I have never heard of it.

17 THE COURT: What does the Bartlett Road have
18 to do with this case?

19 MR. NORFOLK: It's nonconforming use in the
20 Sentinel Wilderness area.

21 THE COURT: Is it somehow connected to the
22 Old Mountain Road?

23 MR. NORFOLK: It's not connected physically.

24 THE COURT: Move on.

25 BY MR. NORFOLK:

1 Q. Can you go to page 18, please? I direct you to
2 number 29.

3 A. Yeah.

4 Q. And I just ask if you could read that to the Court
5 (unintelligible) and then I will have one question for you.

6 A. Yeah. Under the definition sections, of the plan,
7 I guess, the -- number 29 defines what a road is. And --
8 the (unintelligible) definition. But "road, an improved or
9 partially improved way designed for travel by automobiles
10 and which may be also used by other types of motor vehicles,
11 except snowmobiles, unless the way is designated -- is a
12 designated snow trail and is, one, either maintained by
13 state agency or local Government and open to the general
14 public; two, maintained by private persons or corporations,
15 primarily for private use but which may also be open to the
16 general public for all or a segment thereof; or, three,
17 maintained by Department of Environmental Conservation or
18 other state agency and open to the public on a discretionary
19 basis."

20 Q. Thanks. In the definition of wilderness, as you
21 understand it, is there -- are roads allowed to be included
22 in that area?

23 A. I think -- I think it occurs, but I'm not sure I
24 know the answer to that question.

25 Q. (Unintelligible). The -- you were referring to --

1 I think you referred to CPL 490.50?

2 A. I think that's the section.

3 Q. Yeah.

4 A. Yeah.

5 Q. It's correctly stated CPL 450.90 --

6 A. Okay, all right.

7 Q. -- that refers to (unintelligible) appeal to the
8 Court of Appeals as an intermediate Appellate Court?

9 A. Yeah.

10 Q. Did you ever take the chance to read that section?

11 A. Yeah, I have.

12 Q. Okay. In that section, does it state that the
13 would be appellant must make the decision or that the Court
14 of Appeals of the State of New York makes the determination
15 of whether to accept an appeal or not?

16 A. Well, I think the way -- I think -- I'd have to
17 read it again.

18 Q. Okay.

19 A. Okay?

20 Q. Now, I asked -- did you do any research with
21 respect to any court case law or -- that would interpret
22 450.90?

23 A. I -- no, I didn't. I relied upon the advice of
24 the criminal unit of the AG's office.

25 MR. NORFOLK: Okay. I would just ask if I

1 could have the Court take judicial notice of CPL 450.90.

2 THE COURT: Yes.

3 MR. NORFOLK: In particular, 2, sub A.

4 BY MR. NORFOLK:

5 Q. Are you aware of any case law which states that a
6 Court of Appeals case may look beyond the forum of an
7 Appellate decision of an intermediate area court to
8 determine whether or not to accept an appeal?

9 A. Yeah. I'm not aware of any case law either way.

10 Q. So you wouldn't -- okay.

11 MR. NORFOLK: I don't have any further
12 questions.

13 THE COURT: Any recross?

14 MR. MUNRO: No, your Honor.

15 THE COURT: Mr. Lacombe, I have a couple
16 questions.

17 THE WITNESS: Sure.

18 THE COURT: Is your position in the
19 administrative hearing that the Old Mountain Road, the
20 section in question here, was created by statute or by use?

21 THE WITNESS: It will be a use. Do you want
22 any more than that?

23 THE COURT: No.

24 THE WITNESS: Okay.

25 THE COURT: When was -- when do you say the

1 section of the Old Mountain Road in the Town of Keene was
2 abandoned?

3 THE WITNESS: In -- in the '70s or '80s. I
4 mean, it was a progressive thing because of just the lack of
5 maintenance and use, so on. But, clearly, the '87 Master
6 Plan, you know, indicates that it was closed at that point.
7 And that has the effect of law.

8 THE COURT: Prior to 1987 then or in 1987?

9 THE WITNESS: Yeah.

10 THE COURT: And with respect to the Town of
11 North Elba, same answer?

12 THE WITNESS: Yeah.

13 (Pause in proceedings.)

14 THE COURT: Is the administrative proceeding
15 on the record?

16 THE WITNESS: Yes.

17 THE COURT: And finally, how many proceedings
18 in Town Court for the prosecution of tickets have you
19 handled?

20 THE WITNESS: In my position with DEC?

21 THE COURT: Yes.

22 THE WITNESS: Full trials or pleas or --

23 THE COURT: Anything.

24 THE WITNESS: Probably ten to twenty.

25 THE COURT: Thank you. You may step down.

1 THE WITNESS: Yep.

2 THE COURT: We stand in recess until 2:30.

3 MR. NORFOLK: Thank you, your Honor.

4 MR. MUNRO: Thank you, your Honor.

5 (Witness was excused.)

6 (Lunch recess taken at 1:00 PM.)

7 (Court reconvened at 2:48 PM.)

8 THE COURT: Call your next witness, please.

9 MR. NORFOLK: (Unintelligible).

10 THE COURT: Plaintiff rests?

11 MR. NORFOLK: Before I rest, just a couple
12 housekeeping matters. I was gonna call Gabrielle Dunn, who
13 is Gabrielle Demarco, I understand today, but there won't
14 be -- will be no need to call her. It's my understanding
15 from talking to Mr. Munro that the defendants stipulate to
16 the first statements made in that article which was received
17 as Plaintiff's Exhibit 69 as being true and accurate.

18 THE COURT: Is that in evidence?

19 MR. NORFOLK: Yes, it is.

20 THE COURT: Okay.

21 MR. MUNRO: That's right, your Honor. She's
22 a DEC press officer.

23 MR. NORFOLK: So, with that, I am gonna put
24 this over here. The only other housekeeping matter I have
25 is I was straightening up the mess here for the other people

1 to come in and I'm missing -- we are missing, the Court is
2 missing Plaintiff's Exhibit Number 85, which was those
3 copies of the printouts of ECATs, how many were prosecuted
4 and how many were --

5 THE COURT: Right.

6 MR. NORFOLK: And such. I have a copy. I
7 think someone probably just inadvertently walked off with
8 'em.

9 THE COURT: Well, Mr. Lacombe is probably the
10 chief suspect here.

11 MR. MUNRO: Could be, and I understand he
12 will be back.

13 THE COURT: Okay.

14 MR. NORFOLK: Okay. Do you want to wait?
15 And if not, I have copies here.

16 THE COURT: I don't want to delay anything
17 here. We can get -- we will find 'em.

18 MR. NORFOLK: Okay. With that, the people --
19 plaintiff rests its case.

20 THE COURT: All right.

21 MR. MUNRO: Your Honor, at this point, I'd
22 like to make a motion for judgment as a matter of law. I
23 don't believe that the plaintiff has met his burden under
24 the controlling case law to establish bad faith or
25 harassment or other extraordinary circumstances.

1 THE COURT: All right. I'm not sure, in a
2 hearing like this, if a motion like that is appropriate.
3 I'll take the motion so that you preserve the record for
4 whatever you need to do, but I'll deny the motion at this
5 time.

6 All right. Case is now with the defense.

7 MR. MUNRO: We have two witnesses, your
8 Honor.

9 THE COURT: All right.

10 MR. MUNRO: The first is Kenneth Hamm.

11 THE COURT: Please come forward.

12 THE CLERK: Sir, if you'll step right up
13 here. Can I have your name, please?

14 THE WITNESS: Kenneth Hamm, H-A-M-M.

15 THE CLERK: And what's your middle initial?

16 THE WITNESS: R.

17 THE CLERK: Raise your right hand.

18 (Witness duly sworn.)

19 THE CLERK: This is Kenneth Hamm, H-A-M-M.

20 - - - - -

21

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25

1 K E N N E T H R. H A M M ,
2 having been called as a witness, being duly sworn,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. MUNRO:

6 Q. Mr. Hamm, could you tell us who you are? I know
7 your a lawyer with DEC, but beyond that.

8 A. I am an associate attorney with the Department of
9 Environmental Conservation in the Division of Legal Affairs.

10 Q. And what are your responsibilities in that
11 position?

12 A. Currently, I'm a bureau chief. I supervise four
13 attorneys. We have responsibilities for real property,
14 lands and forests, solid waste and contracts, and I'm also
15 the program attorney for the Division of Solid Waste. I
16 work specifically on forest preserve issues.

17 MR. NORFOLK: Excuse me, Judge, I'm sorry --
18 I think there's a witness that's not on the witness list for
19 the defendants (unintelligible).

20 MR. MUNRO: Oh, I'm sorry. That's right.
21 I'm sorry. No problem. Very sorry about that.

22 THE COURT: All right. Thank you. You may
23 proceed.

24 BY MR. MUNRO:

25 Q. And prior to -- how long have you had that

1 position?

2 A. I began work with the Department of Environmental
3 Conservation in July of 1990, initially began as a solid
4 waste attorney, worked in that position for approximately
5 three years, then began working as a program attorney to the
6 Division of Lands and Forests. Did that for a couple years
7 and then started to work on legal issues related to
8 implementation of the 1996 Clean Air Clean Water Bond Act.
9 Worked in that position for a couple years. When legal
10 issues related to the Bond Act started to wind down, I went
11 back and worked again for the Division of Legal Affairs and
12 for the last three years, in addition to my supervisory
13 responsibilities, I've worked almost exclusively on forest
14 preserve issues.

15 Q. And when were you admitted to practice law in the
16 State of New York?

17 A. I was admitted in 1976.

18 Q. And can you describe what it means to be legal
19 counsel to the division of lands and forests? What are your
20 day-to-day responsibilities?

21 A. I respond to day-to-day legal questions that arise
22 from the management of state forest preserve land. The
23 questions come in from staff members of the division of
24 lands and forests, the division director, the Governor's
25 office, the Commissioner, the General Counsel, and also some

1 inquiries that come in from the public.

2 Q. Let's go to 2005. You're aware that Mr. McCulley
3 drove a pickup truck on the -- what the state refers to as
4 the Jack Rabbit Trail, plaintiffs refer to as the Old
5 Mountain Road. You're aware that occurred?

6 A. Yes, I am.

7 Q. And at some point, a criminal ticket that had been
8 issued was withdrawn by DEC; is that correct?

9 A. Yes, that's correct.

10 Q. And were you involved in that decision to withdraw
11 the criminal ticket?

12 A. Yes, I was.

13 Q. And tell us about your involvement in that
14 decision?

15 A. Well, as the program attorney for the Division of
16 Lands and Forests, I knew that this issue was going on in
17 the region. And this was a significant issue for Lands and
18 Forests because there are innumerable old town highways that
19 cross forest preserve land. And if the earlier case, the
20 earlier McCulley case regarding his use of a snowmobile
21 trip -- snowmobile on the Jack Rabbit Trail were to be seen
22 as precedent by other people around the state, that would
23 have a very significant impact on the department's
24 administration of forest preserve land.

25 So, the regional staff was in touch with me,

1 they told me that the ticket had been issued. I did not
2 know the ticket was going to be issued ahead of time, the
3 criminal ticket. After the ticket was issued, there was a
4 significant amount of discussion in the central office with
5 the region about how best to pursue the issue of whether the
6 Old Mountain Road remained a town highway or not.

7 I had discussions with a number of attorneys,
8 both in the central office and an attorney in the Attorney
9 General's office. We discussed the variety of options on
10 what the best way to proceed was, and we decided at that
11 point that we needed to get this issue in a civil court and
12 have a determination on whether this road, this old road was
13 abandoned or not.

14 Q. And what was the specific reason for deciding not
15 to continue criminally?

16 A. We decided that if we had pursued it criminally,
17 if he were convicted again in Justice Court, the case would
18 probably be appealed to the same County Court who had
19 earlier ruled against us.

20 Q. So the option then was to proceed
21 administratively, is that correct?

22 A. That's correct.

23 Q. And who was involved in that decision, besides
24 yourself?

25 A. I had discussions with regional attorney Chris

1 Lacombe, the regional director Stu Buchanan, Rob Davies, the
2 director of the Division of Lands and Forests, Jim Ferrara
3 (phonetic) the General Counsel for the department, Mike
4 Lesser, another attorney in the department, in the Division
5 of Environmental Enforcement.

6 Q. And just approximately, over how many hours did
7 these various discussions take? Was it one hour, five
8 hours, ten hours?

9 A. It's somewhat difficult to quantify because the
10 discussions took place over a number of weeks. I would
11 guess that I spent probably 15 hours on the matter.

12 Q. Now, let's move backwards in time for a minute.
13 You're aware that Judge Halloran had issued a decision, you
14 mentioned that, is that correct?

15 A. Yes.

16 Q. And that decision was adverse to the People of the
17 State of New York?

18 A. Yes.

19 Q. What is your understanding as to what -- how he
20 ruled in that case?

21 A. Well, his -- what he actually ordered was that the
22 criminal ticket was dismissed on the law, on the facts, and
23 in the interest of justice.

24 Q. And we understand that the state did not appeal
25 from that decision. Were you involved in the decision to

1 not appeal Judge Halloran's decision?

2 A. Yes, I was. We had conversations with the
3 criminal division in the Attorney General's office which
4 would represent the department in an appeal. The department
5 wanted very much to appeal the case, but we were told by two
6 attorneys in the criminal division at the Attorney General's
7 office that because of the way the decision was crafted by
8 the County Court, we were not able to appeal it.

9 Q. And so no appeal was taken?

10 A. And so no appeal was taken, yes.

11 Q. Let's talk some more about Judge Halloran's
12 decision. Am I correct in saying you thought that decision
13 was erroneous?

14 A. Yes.

15 Q. Could you tell us why?

16 A. He found, basically, that the Old Mountain Road,
17 which we refer to as the Jack Rabbit Trail, was not
18 abandoned as a matter of law. And I believed, in reading
19 the decision, looking at the cases that he cited, and also
20 applying my own knowledge on road abandonment, that he was
21 mistaken in finding that the existence of some pedestrians
22 and cross-country skiers on that trail preserved it as a
23 town highway and prevented abandonment from occurring.

24 Q. And what is your understanding as to what the case
25 law says?

1 A. My understanding of the case law is that the --
2 for a road to be abandoned, it must not be traveled as a
3 public highway for six or more years.

4 Q. Did Judge Halloran address the issue of creation
5 of a road by statute as opposed to road by use?

6 MR. NORFOLK: I'm gonna object. My specific
7 objection, the case law (unintelligible).

8 THE COURT: Overruled.

9 Q. Do you want me to repeat the question?

10 A. Yes, repeat the question, please.

11 Q. Did Judge Halloran address the issue of the
12 difference between a road created by -- this particular road
13 created by statute as opposed to by use?

14 A. Yes. Judge Halloran found that the road was
15 created by statute.

16 Q. And what is your understanding as to how he
17 reached that conclusion?

18 A. He looked at three old statutes at the beginning
19 of -- in the early 1800s, which appropriated monies for
20 improvements to the road, and found that based upon those
21 statutes, that the road was created by statute and not by
22 use.

23 Q. And what's your understanding as to where he went
24 from there, once he made that conclusion?

25 A. I'm not sure that he -- he made that conclusion,

1 but I'm not sure it was consequential to the rest of the
2 decision. He didn't make a finding as to whether the fee
3 had been acquired for highway purposes or whether just the
4 right-of-way had been acquired for highway purposes.

5 Q. And what is the significance, in your view, of
6 that?

7 A. Well, if -- if a -- if the fee was not acquired,
8 then, clearly, there can be abandonment of the highway under
9 Section 205 of the Highway Law, if there's a six-year period
10 of no use as a public highway.

11 If the fee was acquired, I've never actually
12 researched that issue to see whether a road on a fee highway
13 can be abandoned or not.

14 Q. Now, when you talk about the fee being acquired,
15 you're talking about the two municipalities, North Elba and
16 the Town of Keene, presumably?

17 A. Yes, talking about the municipalities.

18 Q. Do you recall what Judge Halloran said about, in
19 his view, the proper way for the state to close a road?

20 A. Judge Halloran said that the only way for the
21 state to close a public highway was by exercising a 212
22 closure order, issuing a 212 closure order, that's Section
23 212 of the Highway Law, which authorizes the Commissioner of
24 the department to close a public highway that's basically
25 totally surrounded by state land.

1 Q. And you do you agree with that determination or
2 conclusion that he reached?

3 A. No, I disagree with that conclusion. I believe
4 that a highway, even though it's on state forest preserve
5 land, can be abandoned under Section 205 of the Highway Law.

6 Q. Let's come back to 2005 and the decision to
7 enforce against Mr. McCulley administratively. Do you know
8 of any law, any statute or regulation that would require DEC
9 to enforce against Mr. McCulley criminally?

10 A. No.

11 Q. Was is it your position that DEC was on firm legal
12 ground in commencing administrative enforcement proceeding
13 against Mr. McCulley?

14 A. Yes. It's my understanding that the department
15 has a variety of options it may pursue in deciding whether
16 to prosecute somebody. And the department can exercise its
17 discretion as to which option it selects.

18 Q. And explain to us, just for a minute, about the
19 grounds for the administrative enforcement proceeding as
20 well as the relief sought. What was the basis for the
21 administrative enforcement complaint that was served on
22 Mr. McCulley?

23 A. That Mr. McCulley had violated a section of our
24 regulations that prohibited the operation of a motor vehicle
25 in an area that wasn't designated for motor vehicle use.

1 Section 196.1, I believe it is.

2 Q. And what is the relief that is sought in that
3 administrative complaint?

4 A. I'm not the attorney who's working on the
5 administrative complaint. I believe that they're seeking a
6 penalty and an injunction to prevent him from riding on that
7 road in the future.

8 Q. As counsel to the Division of Lands and Forests,
9 is the -- what I'll refer to as the McCulley matter, does it
10 raise important issues for the Division of Lands and Forests
11 and for DEC in general?

12 A. It raises extremely important issues. The
13 department owns approximately -- the State of New York owns
14 land managed by the department that totals in guess of 15
15 percent of the land mass of the State of New York. And as
16 you would expect, on a land mass of that size, there are
17 considerable numbers of old trails and town highways and
18 county highways that cross the land. Therefore, a decision
19 that finds that foot traffic and cross-country ski traffic
20 on one of these old roads prevents the road from being
21 abandoned and, therefore, the public has a right to use
22 motor vehicles on it has a very considerable impact on the
23 management of those lands by the department.

24 Q. And isn't it your position that the Jack Rabbit
25 Trail, the three-and-a-half mile section that has been at

1 issue in this proceeding, has been abandoned?

2 A. Yes. That's my belief.

3 Q. And can you state the basis for that belief and
4 when you believe that the former road was abandoned?

5 A. In order to give an opinion on precisely when the
6 road was abandoned, I would have to be presented with
7 evidence as to when it was last used as a public highway
8 and, thus far, I haven't seen any evidence that it's been
9 used as a public highway by motor vehicles since at least
10 1972, when the Master Plan -- the Adirondack Park State Land
11 Master Plan was first adopted.

12 Q. Do you know whether this former road has ever been
13 used by motor vehicles?

14 A. I have no knowledge of that.

15 Q. Okay.

16 A. Other than Mr. McCulley on two occasions.

17 Q. Do you believe that the DEC enforcement process
18 will be biased against Mr. McCulley?

19 A. No. Mr. McCulley has a right to counsel in that
20 process, he can -- ultimately, the decision will be made by
21 the Commissioner, he can appeal a decision of the
22 Commissioner to Supreme Court, and then to the Appellate
23 Division and the Court of Appeals, if need be.

24 Q. Speaking -- just focusing on your own involvement,
25 did DEC decide to file administrative enforcement complaint

1 against Mr. McCulley to retaliate against him in any manner?

2 A. Absolutely not.

3 Q. When did you first meet Mr. McCulley?

4 A. I don't believe I've ever met Mr. McCulley.

5 Q. In your view again, did DEC decide to file
6 administrative enforcement complaint against Mr. McCulley to
7 restrain his First Amendment right to freedom of speech or
8 freedom of expression?

9 A. No. The department is often criticized by just
10 about every interest group in the public, whether it's a
11 private citizen, an environmental group, a snowmobile group,
12 a municipality, we expect public criticism and public
13 criticism helps make our decisions better.

14 Q. And to make your job harder, right?

15 A. And make my job harder, yes.

16 Q. Was the administrative enforcement proceeding
17 initiated in order to harass Mr. McCulley?

18 A. No.

19 Q. Do you believe that the regulation on which DEC's
20 enforcement proceeding is based, which you testified is
21 196.1, to be legally valid?

22 A. Yes. I believe it was adopted by complying with
23 the State Administrative Procedures Act.

24 Q. To your knowledge, did DEC commence the
25 enforcement proceeding against Mr. McCulley based on the

1 request or on the wishes of environmental groups?

2 A. As far as I know, the environmental groups have
3 never discussed the issue with us.

4 Q. How about based on requests or the wishes of the
5 Adirondack Ski Touring Council?

6 A. Not to my knowledge.

7 Q. Based on the request or wishes of any other group?

8 A. The decision was solely the department's decision.

9 Q. Do you believe that DEC is selectively prosecuting
10 its regulations against Mr. McCulley?

11 A. No, I don't.

12 Q. Do you believe that DEC is seeking to violate his
13 due process rights?

14 A. No.

15 Q. Do you believe that DEC is seeking to violate his
16 right to equal protection under the laws?

17 A. No.

18 MR. MUNRO: I have no further questions.

19 THE COURT: Mr. Norfolk.

20 MR. NORFOLK: Yes, your Honor
21 (unintelligible).

22 CROSS-EXAMINATION

23 BY MR. NORFOLK:

24 Q. Mr. Hamm, I'm Mr. Norfolk. We met last time you
25 were in court on this matter.

1 So, it's the DEC's position that the decision
2 handed down from Essex County Court would be a big precedent
3 in the forest preserve land. Is that what you're testifying
4 to today?

5 A. Some people may interpret it that way.

6 Q. How about the DEC's position? Is it a big issue
7 that it could have an affect on the roads and trails as you
8 testified --

9 A. It is potentially -- yes, it is potentially a big
10 issue.

11 Q. And that's been the DEC's position since the
12 Halloran decision came out?

13 A. I'm not sure I can speak for DEC on that. I can
14 give you my personal opinion.

15 Q. Okay. When you were testifying earlier, answering
16 Mr. Munro's questions, were you speaking on your own
17 personal opinion, belief, or on what the DEC's position was
18 with respect to this could have quite a precedent on the
19 forest preserve lands?

20 A. I was speaking on DEC's behalf. But at that
21 point, I wasn't speaking about DEC's position at the moment
22 the decision was issued.

23 Q. Okay. But today, as we speak today, the DEC's
24 position on the Halloran decision is that it has -- could
25 have a large affect, a precedent on the forest preserve

1 lands and the trails there and how they're deemed to be a
2 road or not?

3 A. It could be interpreted that way.

4 Q. I would like to offer you Plaintiff's Exhibit 69.
5 May I approach, Mr. Hamm?

6 I ask you to just take a look at it and see
7 what it is and I'm gonna ask you some questions about it.

8 A. (Witness complies.)

9 THE COURT: For the record, Mr. Norfolk, what
10 is Plaintiff's Exhibit 69?

11 MR. NORFOLK: Plaintiff's Exhibit 69 is a
12 Press Republican news article, "The DEC let's stand opening
13 of wilderness road."

14 THE COURT: Okay.

15 BY MR. NORFOLK:

16 Q. I am going to refer you to this paragraph and ask
17 that you read this to the Court, from this point right there
18 (indicating).

19 A. You would like me to read it?

20 Q. Read it outloud.

21 A. Okay. "Dunn (phonetic) would not confirm that DEC
22 is considering closing the road, but she did say Halloran's
23 ruling, quote, does not set any precedent for any other
24 roads in the forest preserve, unquote."

25 Q. Who's Dunn or Donn?

1 A. She works in our press office.

2 Q. She works for the DEC?

3 A. Works for the DEC in our press office.

4 Q. And she has authority to make public statements to
5 news media, reporters?

6 A. Yes, she does.

7 Q. Doesn't that statement contradict what you are
8 testifying here today, sir?

9 A. I'd like to see the statement again, please.

10 Q. Oh, sure, I'm sorry.

11 A. No, I don't think it contradicts what I just
12 stated, because I just stated that the current belief of the
13 department is that this could have significant precedent.
14 That was not the belief of the department at the moment the
15 decision was issued.

16 Q. So the DEC decision has changed, since the ruling
17 on the -- Mr. McCulley's conviction, reversal?

18 A. I wouldn't say that it changed. What I've said is
19 that the decision could be interpreted as setting
20 significant precedent. I didn't say that it is significant
21 precedent.

22 Q. Okay. So I'm gonna ask you: Does the DEC
23 consider this case a case of precedent or not?

24 MR. MUNRO: Objection. Can we clarify when
25 we say "this case"?

1 THE COURT: Sustained.

2 BY MR. NORFOLK:

3 Q. Does the DEC consider the Court -- the Essex
4 County Court of Appeal decision, reversing Mr. McCulley's
5 conviction for operating a snowmobile on the Old Mountain
6 Road, does the DEC consider that decision having precedent
7 on the forest preserve lands or not?

8 A. The DEC believes that there are those who will say
9 that it is precedent.

10 Q. Well, what -- does the DEC believe it, yes or no?

11 A. I think the department currently believes that it
12 will be interpreted that way.

13 Q. Now, correct me if I'm wrong, but in response to
14 Mr. Munro's direct examination, you testified
15 (unintelligible) of the Essex County Court on Appeal could
16 cause a precedent, that would be, quote, a big problem, end
17 quote. Is that my correct understanding of your testimony?

18 A. Yes, I said it could. I didn't say it would.

19 Q. How could it have a big precedent that would be a
20 big problem if it went to Essex County Court of Appeals?

21 A. Well, we don't know how Courts will interpret the
22 decision in the future.

23 Q. Aren't you really sayin' that if Essex County
24 Court gets this case on appeal, you're gonna lose?

25 A. No. Because I think there are a number of other

1 decisions out there that hold differently than the Halloran
2 decision holds. And if another case winds its way through
3 the courts with similar facts, the reviewing court would
4 look not just at the Halloran decision, but at the other
5 decisions as well.

6 Q. But what do you think the Essex County Court would
7 have done?

8 A. Oh, the Essex County Court, I assume that Judge
9 Halloran would have ruled the same way.

10 Q. And what would that be?

11 A. He would have thrown the ticket out in the
12 interest of justice.

13 Q. He also did it on the law and the facts, correct?

14 A. On the law and the facts, yes.

15 Q. Okay. Are you familiar with New York State CPL
16 450.90?

17 A. Not off the top of my head.

18 Q. It's the statute that -- in the Criminal Procedure
19 Law that refers to when an intermediate Appellate Court can
20 appeal or not. Does that refresh your memory of the
21 section?

22 A. Yes, um-hum.

23 Q. Have you done any research on that section?

24 A. I looked at the section and reviewed a couple of
25 the cases, I believe.

1 Q. So you know of subsection 2, sub A, what it states
2 then, correct?

3 A. I would need to look at it and --

4 MR. NORFOLK: May I approach?

5 THE COURT: Yes.

6 Q. This here is (unintelligible). 2, sub A.

7 (Pause in proceedings.)

8 A. Okay.

9 Q. Does Section 450.90, 2, sub A, state that an
10 appeal to the Court of Appeals from an intermediate
11 Appellate Court should -- may be taken if the Department of
12 Environmental Conservation deems it so?

13 A. I don't understand the question. I'm sorry.

14 Q. Does 450.90, sub 2, A, state that the Court of --
15 an appeal can be taken to the Court of Appeals from an order
16 of an intermediate Appellate Court if the Department of
17 Environmental Conservation determines it?

18 A. It does not mention the Department of
19 Environmental Conservation in the provision.

20 Q. What does that section, 2, sub A, of 450.90 of the
21 CPL state, which body determines whether or not appeal can
22 be taken?

23 A. I'll read the section. "The Court of appeals
24 determines that the intermediate Appellate Court" -- let me
25 backtrack.

1 Section 2 of 450.90. "An appeal to the Court
2 of Appeals from an order of an intermediate Appellate Court
3 reversing or modifying a judgment, sentence or order of a
4 criminal court may be taken only if, A, the Court of Appeals
5 determines that the intermediate Appellate Court's
6 determination of reversal or modification was on the law
7 alone or upon the law and such facts which but for the
8 determination of law would not have led to reversal or
9 modification."

10 Q. Okay. Thank you. So, the Department of
11 Environmental Conservation, at least pursuant to 450.90,
12 isn't given any kind of statutory authority to make that
13 determination, correct? To make the determination whether
14 an appeal should be gone -- should be taken to the Court of
15 appeals or an intermediate Appellate Court, correct?

16 A. That's correct.

17 Q. Are you familiar with the case of People versus
18 Diaz, 81 NY 2d 106, 1993?

19 A. I would need to see the case, but I don't remember
20 it off the top of my head.

21 Q. Perhaps I can refresh your memory. In that
22 case -- in that case, the Court of Appeals ruled that its
23 proper for the Court of Appeals to look beyond the forum of
24 an Appellate decision to determine whether indeed it was
25 made on the law, the facts or something else. Does that

1 refresh your memory of that case?

2 A. No.

3 (Pause in proceedings.)

4 MR. NORFOLK: That's it, your Honor. Thank
5 you, Mr. Hamm.

6 THE COURT: Any redirect?

7 MR. MUNRO: Nothing further, your Honor.

8 THE COURT: Thank you. You may step down,
9 Mr. Hamm.

10 (Witness was excused.)

11 THE COURT: Call your next witness, please.

12 MR. MUNRO: Yes. Can Mr. Hamm stay now that
13 he's testified?

14 THE COURT: Any objection?

15 MR. NORFOLK: I have no objection.

16 THE COURT: Yes.

17 MR. MUNRO: Okay. And if you could get Rob,
18 or someone --

19 THE COURT: I am sorry. Mr. Hamm? Mr. Hamm?

20 THE WITNESS: Yes.

21 THE COURT: I'm sorry, I had a couple
22 questions.

23 THE WITNESS: Okay.

24 THE COURT: You were almost out.

25 THE WITNESS: Wasn't fast enough.

1 THE COURT: Two steps, you were there. I'm
2 sorry.

3 (Witness resumed the stand.)

4 THE COURT: Is it your view that the road in
5 question here, the Old Mountain Road and the section we're
6 talking about was created by use or by statute?

7 THE WITNESS: I believe in looking at the
8 three statutes, based upon what I know about the factual
9 history, that it was created by use.

10 THE COURT: All right. Now, what
11 obligations, if any, under Section 205 of the Highway Law,
12 does DEC have for abandonment?

13 THE WITNESS: I'm not sure I understand the
14 question, your Honor.

15 THE COURT: Well, you said Section 205
16 authorizes abandonment of a road. What obligations, if any,
17 does DEC have, if it asserts that a road has been abandoned?

18 THE WITNESS: If a road has been abandoned
19 under Section 205 of the Highway Law, the department doesn't
20 have to take any further action to close the road. The road
21 is abandoned as a matter of law if there hasn't been the use
22 of the road for the six-year period.

23 THE COURT: All right. And again the use you
24 talk about is the use by motor vehicles, correct?

25 THE WITNESS: Use as a public highway.

1 THE COURT: Are you aware of a decision in
2 case of People versus Paul Smiths? I'm not, so... But it
3 came up here today. Are you aware of it?

4 THE WITNESS: No, I'm not.

5 THE COURT: So -- the contention has been
6 that this case held that the road in question here was
7 created by statute and not by use in the 1950s. You're not
8 aware of it?

9 THE WITNESS: I don't recall the case off the
10 top of my head.

11 THE COURT: Get outta here quick.

12 THE WITNESS: Thank you, your Honor.

13 THE COURT: Thank you.

14 (Witness was excused.)

15 THE CLERK: Can I have your name, please?

16 THE WITNESS: Robert Davies.

17 THE CLERK: Spell your last name.

18 THE WITNESS: D-A-V-I-E-S.

19 THE CLERK: Your middle initial?

20 THE WITNESS: K.

21 THE CLERK: Raise your right hand.

22 (Witness duly sworn.)

23 THE CLERK: This is Robert K Davies,

24 D-A-V-I-E-S.

25 THE COURT: Mr. Munro.

1 R O B E R T K. D A V I E S ,

2 having been called as a witness, being duly sworn,

3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. MUNRO:

6 Q. Good afternoon, Mr. Davies. Can I call you Rob,
7 if that's all right?

8 A. That's fine.

9 Q. Rob, how long have you been employed at DEC?

10 A. Since 1990.

11 Q. And what was your first employment there?

12 A. I was program counsel for the Division of
13 Hazardous Waste Remediation.

14 Q. And you held that position until when?

15 A. I believe I held that position to around 1994,
16 where I then became counsel for the Onondaga Remediation
17 Project, Onondaga Lake Remediation Project.

18 Q. Okay. And how long did you do that?

19 A. Until ninety -- 1998.

20 Q. At which point you had some different
21 responsibilities?

22 A. I then became the counsel for the Real Property
23 Office of -- at the DEC.

24 Q. Okay. And you had that position until when?

25 A. Until September 12, 2001.

1 Q. And you were admitted to practice in the State of
2 New York when?

3 A. In 1990.

4 Q. And during your time in law school, you clerked in
5 the Attorney General's Environmental Protection Bureau, is
6 that correct?

7 A. Yes, I did.

8 Q. And who was your supervisor then?

9 A. You.

10 (Laughter.)

11 THE COURT: Have you recovered?

12 THE WITNESS: Yes, I have. He was a good
13 teacher.

14 BY MR. MUNRO:

15 Q. Tell the Court about your current responsibilities
16 at DEC.

17 A. I am currently, as I said, starting in September
18 2001, Director of Lands and Forests at the DEC, which is --
19 that division is responsible for the management of over four
20 million acres of state-owned land across all nine regions of
21 the state.

22 Q. And do you function as a lawyer in that position?

23 A. No.

24 Q. Do you function as a policy person?

25 A. Policy manager, right.

1 Q. And who is the lawyer in your view to that
2 division within DEC?

3 A. The attorney that we deal with mostly is Ken Hamm.

4 Q. Let's focus now on the issues that are involved in
5 this proceeding, and I want to start with 2005. You're
6 aware that Mr. McCulley drove his pickup truck on the --
7 what the state refers to as the Jack Rabbit Trail,
8 Mr. McCulley refers to as the Old Mountain Road, you're
9 aware that that occurred?

10 A. Yes, I am.

11 Q. And you're aware that at some point a criminal
12 ticket that had been issued was withdrawn by DEC; is that
13 correct?

14 A. That's correct.

15 Q. And were you involved in that decision to withdraw
16 the criminal ticket?

17 A. Yes, I was part of those discussions.

18 Q. And tell me who else was involved?

19 A. Ken Hamm, Stu Buchanan and the regional attorney
20 for Region 5, Chris Lacombe, and also the Assistant Attorney
21 General, Lisa Burianik (phonetic) was quite involved in
22 those discussions as well.

23 Q. Anybody else within DEC?

24 A. Mike Lesser, also from the counsel's office. Mike
25 focuses on the criminal side of things.

1 Q. And what is your understanding as to why DEC made
2 a decision to withdraw the criminal ticket?

3 A. I believe that the department felt as though the
4 matter would end up before the same tribunal that the
5 previous action occurred in, and the factual record would
6 not be developed to make a determination as to the real
7 facts of the matter.

8 Q. And so a determination was made to instead proceed
9 administratively, is that correct?

10 A. It was felt as though going administratively we
11 would develop a factual record to make a determination on.

12 Q. And were you involved in that decision, to proceed
13 administratively?

14 A. Yes.

15 Q. And was that the same people in that decision as
16 well that you just named?

17 A. Right. And I -- I think I failed to mention Jim
18 Ferrara, who is also the General Counsel at DEC. He,
19 obviously, was part of that discussion as well.

20 Q. Did you talk to Jim Ferrara directly yourself?

21 A. Yes.

22 Q. And what is DEC alleging, as you understand it, in
23 the 2005 administrative enforcement proceeding?

24 A. That Mr. McCulley drove a motor vehicle on forest
25 preserve land which is classified wilderness and, under

1 196.1 of 6 NYCRR, that's a violation of our regulations.

2 Q. Let's go back in time a little bit to the decision
3 of Judge Halloran in Essex County Court.

4 A. Um-hum.

5 Q. Are you familiar with that decision?

6 A. Yeah, I'm familiar with it.

7 Q. Can you tell us what that decision held, first of
8 all?

9 A. I -- my understanding is is that Judge Halloran's
10 decision was to rescind the ticket that was issued by the
11 department in the interest of justice.

12 Q. And beyond that, did he reach other conclusions
13 with regard to the legal status of the Jack Rabbit Trail/Old
14 Mountain Road?

15 A. There was certainly --

16 MR. NORFOLK: Objection, Judge.

17 THE COURT: Overruled.

18 A. There was certainly discussions and opinion, I
19 think, expressed by the judge in that decision. But I think
20 that the holding was narrowly defined as rescinding the
21 ticket in the interest of justice.

22 Q. Let's talk for a minute about some of what you
23 refer to as opinions in the decision.

24 Do you remember what Judge Halloran said
25 beyond his holding with regard to the status of this

1 road/trail?

2 A. Yeah. I believe that the Judge found that the
3 Jack Rabbit Trail was not officially abandoned as an old
4 town road.

5 Q. And as a result of that, he concluded what?

6 A. He concluded that Mr. McCulley had still the
7 right, as a town road, to drive a motor vehicle on it.

8 Q. And do you recall Judge Halloran reaching any
9 opinion with regard to his view as to how -- what DEC would
10 have to do to close a road?

11 A. I believe Judge Halloran felt that the department
12 should issue a 212 order under the Highway Law if they
13 wanted to actually close the road.

14 Q. And did you agree with the opinions of Judge
15 Halloran and his decision?

16 A. No, I did not.

17 Q. And did you discuss those opinions with others
18 within DEC?

19 A. Yes, I did.

20 Q. And would that be the same people you've mentioned
21 earlier?

22 A. Yes, it would.

23 Q. Were you involved in discussions with regard to
24 appealing Judge Halloran's decision and whether an appeal
25 could be taken?

1 A. Yes, I was.

2 Q. And could you just describe for us what those
3 discussions involved?

4 A. Well, I think there was a consensus among the
5 people that I mentioned that Judge Halloran's decision was
6 in error and that we felt very strongly that we should
7 appeal it, but the Criminal Bureau at the Attorney General's
8 office felt that it was, for some very complicated issues
9 involved with the decision, it was not appealable to the
10 Court of Appeals.

11 Q. Is it fair to say that you, at least personally,
12 were disappointed with their conclusion?

13 A. I would say that that would be a very fair
14 statement.

15 Q. Is that true of others at DEC, to your knowledge,
16 that --

17 A. Yes.

18 Q. Is the administrative enforcement case against
19 Mr. McCulley that's presently pending, in your view, does
20 that raise important issues for your Division of Lands and
21 Forests?

22 A. I think it raises some very important issues for
23 our division.

24 Q. Can you explain why?

25 A. Well, the -- there's millions of acres of forest

1 preserve and four million acres or more of state-owned land
2 across the state where there are literally hundreds of miles
3 of these ancient roadways that have long been abandoned and
4 cease to be used nor maintained for motor vehicle use that
5 are now either not a road at all and serve as a recreational
6 trail or have just disappeared completely.

7 And if we were -- the department was required
8 to go out and take some type of affirmative steps to
9 officially close these already previously abandoned and long
10 forgotten roads, that would be a tremendous burden on the
11 department.

12 Q. Now, when you use the word "abandoned" and you use
13 "motor vehicles," are we talking about abandoned meaning no
14 longer being used by motor vehicles?

15 A. When I say "abandoned," I mean no longer -- under
16 the Highway Law, there's, as I understand it, a principle of
17 abandonment, where if a town ceases to maintain for six
18 years or more, the motor vehicle use is no longer being used
19 legally on those roadways, there are official maps that do
20 not depict those old roadways as official town roads, then
21 those roads are abandoned. And that's kinda the end of the
22 story for that road.

23 Q. And what is your position on whether the Jack
24 Rabbit Trail/Old Mountain Road, the three-and-a-half miles
25 that's at issue in this proceeding, whether that's been

1 abandoned?

2 A. I understand, and my belief is, is that that
3 three-and-a-half miles of the Jack Rabbit Trail was long ago
4 abandoned, has not been maintained by any town for the
5 purposes of motor vehicle use and it has been long
6 recognized and designated as a recreational trail for hiking
7 and cross-country skiing.

8 Q. Now, there's been testimony that the Adirondack
9 Ski Touring Council and Tony Goodwin have done some
10 maintenance on the Jack Rabbit Trail with the permission of
11 the DEC. Are you familiar with that?

12 A. Yes, I am.

13 Q. And what is the authorization that DEC provided to
14 Mr. Goodwin and that group?

15 A. The initial authorization was through a temporary
16 revokable permit which permitted that entity to take certain
17 maintenance measures to keep that trail in a safe and
18 protective condition and after that, and in more recent
19 years, it was under an Adopted Natural Resource agreement,
20 or an AANR agreement.

21 Q. And is it your understanding that when we talk
22 about maintenance by that group we're not talking about
23 maintenance for use by a motor vehicle?

24 A. At -- no.

25 Q. What type of maintenance are we talking about?

1 A. Maintenance, keeping the trail brushed, keeping
2 the trail unobstructed by trees. Trees are often falling
3 across all sorts of trails. Keeping washouts cleaned out
4 and culverts clean so that the trail doesn't get washed out
5 in storm events. Typical maintenance of the trail.

6 Q. And this is for what uses?

7 A. For cross-country skiing and hiking.

8 Q. Okay. But not for any motor vehicles?

9 A. No motor vehicle use.

10 Q. Not for any snowmobile use?

11 A. No snowmobile use.

12 Q. Do you believe that the DEC enforcement process
13 that's been initiated against Mr. McCulley will be biased in
14 any way?

15 A. No, I do not.

16 Q. In your view, did DEC file the administrative
17 enforcement complaint against Mr. McCulley to retaliate
18 against him in any manner?

19 A. No.

20 Q. Have you met Mr. McCulley before?

21 A. Yes, we have met.

22 Q. And under what circumstances have you met?

23 A. In -- most times, at public hearing events for
24 when the DEC's out at public meetings for -- we have an ATV
25 policy, a draft ATV policy, Mr. McCulley has been there,

1 I've been there, we've had discussions. There was -- we
2 were out with a recent snowmobile plan for the Adirondacks.
3 We went across the state with those hearings, and I've seen
4 Mr. McCulley and spoken to him at those, too.

5 Q. And you have been representing DEC at those
6 hearings, is that correct?

7 A. Yes, I do.

8 Q. In your view, did DEC decide to file the
9 administrative enforcement complaint against Mr. McCulley to
10 restrain his First Amendment rights to either freedom of
11 speech or expression?

12 A. Absolutely not.

13 Q. And in your experience, Mr. McCulley has exercised
14 those First Amendment rights, is that correct?

15 A. He does a very good job of that.

16 Q. Has DEC initiated the administrative enforcement
17 proceeding against Mr. McCulley in order to harass him, in
18 your view?

19 A. No.

20 Q. Do you believe that the regulation that DEC is
21 seeking to enforce administratively, 196.1, to be legally
22 valid?

23 A. Yes.

24 Q. To your understanding, did DEC commence the
25 administrative enforcement proceeding against Mr. McCulley

1 based on the request or the wishes of any environmental
2 groups?

3 A. No.

4 Q. Based on the request or wishes of the Adirondack
5 Ski Touring Council?

6 A. No.

7 Q. Any other group or individual?

8 A. No.

9 Q. This is DEC's decision?

10 A. The consensus decision with the people that I
11 mentioned.

12 Q. Do you believe that DEC is selectively prosecuting
13 its regulations against Mr. McCulley?

14 A. No, I do not.

15 Q. Do you believe that DEC is seeking to violate his
16 due process rights?

17 A. No.

18 Q. How about his rights to equal protection under the
19 law?

20 A. No.

21 MR. MUNRO: I don't have any further
22 questions.

23 THE COURT: Mr. Norfolk.

24 - - - - -

25

1 CROSS-EXAMINATION

2 BY MR. NORFOLK:

3 Q. Hi, Mr. Davies, I'm Matt Norfolk, Jim McCulley's
4 attorney.

5 You're an attorney. Are you today admitted
6 as an attorney?

7 A. Yes, I am.

8 Q. Do you keep current on your continuing legal
9 education?

10 A. Yes, I do.

11 Q. You gave testimony that the DEC is always getting
12 involved (unintelligible) of the Adirondack Ski Touring
13 Council to maintain Jack Rabbit Trail or what we refer to --
14 have been referring to as the Old Mountain Road. Is that
15 your testimony today, that they always receive authorization
16 for them to maintain it?

17 A. For as long as I've known or the records show that
18 they have been maintaining that trail, they've done it
19 pursuant to a permit or this AANR.

20 Q. What records are you lookin' at?

21 A. The records at the department that we held.

22 Q. At the Division of Lands -- (unintelligible) or
23 the department in its entirety hold?

24 A. Within the division, our records.

25 Q. Is it possible that DEC Region 5 records are

1 completely different from your records?

2 A. Well, I consider the Region 5 records to be our
3 records.

4 Q. If I told you today there's a stack full of
5 evidence over here that shows that the department had
6 basically said, hey, we don't have jurisdiction over the Old
7 Mountain Road in the 1990s and Adirondack Ski Touring
8 Council, go do what you gotta do, go to the town, would that
9 be in your record?

10 MR. MUNRO: Objection. I object to the
11 phrase "stack of records." I don't know what that means.

12 THE COURT: Overruled. You may answer the
13 question.

14 A. Can I hear the question again?

15 Q. If I told you that there's evidence here,
16 documentation admitted into evidence, records that had
17 stated -- show that the Department of Environmental
18 Conservation, in the mid '90s, told the Adirondack Ski
19 Touring Council, hey, we don't have any jurisdiction over
20 the Old Mountain Road, don't come to us for authorization of
21 maintenance, go to the towns, would those records that I'm
22 referring to be with your records?

23 A. If they're in the regional records, they would be
24 within our records, yes.

25 Q. Have you done a search of your records before you

1 came here today to discuss this, to give testimony on this?

2 A. I -- did I personally go and search through all
3 the records?

4 Q. Yes.

5 A. No, I did not.

6 Q. When making this decision and spending hours, I
7 would assume, deciding whether to bring Mr. McCulley into
8 administrative proceeding or take him into a Town Court, did
9 you do any research on these -- in your own records
10 maintained by your office?

11 A. Yeah, we did research, I did research and I rely
12 heavily on the opinions of our legal staff.

13 Q. Okay. Did you go -- when you looked at these
14 records, did you look at any records in the 1990s?

15 A. Yes.

16 Q. Now, you testified that the department, and the
17 people you mentioned, had made discussions and your concern
18 was that this matter would go back to the same tribunal?

19 A. Right.

20 Q. What tribunal were you referring to?

21 A. Judge Halloran's -- the County Court.

22 Q. Okay. Now, you know that a County Court -- Court
23 of Appeals, not the Court of Appeals, but Appellate Court,
24 doesn't make or establish a record at that level, correct?

25 A. Yes.

1 Q. So -- but, you testified you didn't want it to go
2 back to the same tribunal and not make a determination on an
3 improper record of facts. That doesn't make sense, does it?
4 The Appellate Court doesn't establish a record of facts?

5 A. No. I want to establish a record.

6 Q. In the Appellate Court proceeding?

7 A. In an adjudicatory proceeding, which an
8 administrative proceeding would do.

9 Q. Wouldn't the Town of North Elba or Town of Keene
10 criminal proceeding establish a record?

11 A. I believe that there was a record established in
12 the Town of Keene, but then that was appealed to the County
13 Court.

14 Q. I understand that.

15 A. Okay.

16 Q. But you testified today that the decision was made
17 to get it out of that same tribunal and bring it into the
18 DEC administrative proceeding because you were concerned
19 that proper record of facts would not be established and
20 you've said the same tribunal that Mr. McCulley was tried in
21 earlier for the snowmobile. So, are you saying that the
22 record that would be established in a town court proceeding
23 would have been deficient as opposed to an administrative
24 proceeding?

25 A. No. I was saying that the process that we went

1 through before did not establish a clear record of facts and
2 we wanted to try to develop a good record of facts that
3 could then be adjudicated.

4 Q. Okay. Did you know that the Keene Court trial
5 took over four hours? Did you know that?

6 A. No, I didn't.

7 Q. Did you know that Mr. McCulley only had one
8 objection granted -- or sustained during that whole four
9 hours of trial? Did you know that?

10 A. No, I did not.

11 Q. Did you know that essentially -- withdrawn.

12 Did you know that Christopher Lacombe and the
13 DEC regional attorney had four hours to present everything
14 and anything he wanted to to the Keene trial court. Did you
15 know that?

16 A. No, I didn't know about the four hours.

17 Q. Okay. But you and your colleagues at the DEC made
18 a base -- made your decision to bring Mr. McCulley into the
19 administrative enforcement proceeding because you were
20 afraid that the tribunal that had tried that earlier, Town
21 of Keene or Town of North Elba, local Town Court, would not
22 be able to have the facts established to have a good record,
23 is that correct?

24 A. We were not afraid. We made a determination that
25 it was the best avenue to take to develop a factual record

1 to be adjudicated on.

2 (Pause in proceedings.)

3 Q. Is Mr. Lacombe gonna have a better opportunity to
4 get more facts in, establish the record better in the
5 administrative enforcement proceeding than he would in the
6 North Elba Town Court or Keene Town Court?

7 A. I can't answer that.

8 Q. Why not? You're an attorney.

9 A. Yeah, I'm --

10 THE COURT: Don't argue with the witness,
11 Mr. Norfolk.

12 MR. NORFOLK: I apologize.

13 Q. But why not?

14 A. 'Cause I don't know what that proceeding will be.
15 I mean, that proceeding has not occurred.

16 Q. But you were one of the representatives of the DEC
17 who made this decision to go and commence an enforcement
18 proceeding against Mr. McCulley and withdraw the criminal
19 court action?

20 A. Yes.

21 MR. NORFOLK: No further questions.

22 THE COURT: Any redirect?

23 MR. MUNRO: No, your Honor.

24 THE COURT: You may step down. Thank you.

25 THE WITNESS: Thank you.

1 (Witness was excused.)

2 THE COURT: Any further witnesses?

3 MR. MUNRO: No, your Honor.

4 THE COURT: Defense rests?

5 MR. MUNRO: Yes, your Honor.

6 THE COURT: Any rebuttal?

7 MR. NORFOLK: No, your Honor.

8 THE COURT: Take a break and hear closing
9 arguments. I've got 3:45. Make it 4 o'clock.

10 (Short recess taken at 3:45 PM.)

11 (Court reconvened at 4:00 PM.)

12 MR. NORFOLK: Your Honor.

13 THE COURT: Mr. Norfolk.

14 MR. NORFOLK: Yes. I would like to make my
15 closing (unintelligible) Plaintiff's Exhibit 85 original.

16 THE COURT: What is 85?

17 MR. NORFOLK: The New York State Department
18 printouts about the ECATs we discussed.

19 THE COURT: You never found 'em?

20 MR. NORFOLK: No. But we have several copies
21 which I think, I'm hopin' they are stipulated.

22 MR. MUNRO: We can produce another original
23 if you want one or we'll stipulate.

24 THE COURT: That's fine. You guys can work
25 it out and give me whatever you agree on.

1 MR. NORFOLK: Okay. All right. I am just
2 gonna put this in right now, it's just a copy.

3 THE COURT: All right.

4 MR. NORFOLK: Okay. Your Honor, this
5 evidentiary hearing was ordered by Judge Kahn for plaintiff
6 to address the alleged excessive (unintelligible) abstention
7 in this case and to address the Younger-Pullman Doctrine of
8 Abstention. At this hearing, the evidence that's been
9 presented by plaintiff is that the defendants' personal
10 animus against Mr. McCulley motivated the commencement of
11 the DEC administrative proceeding. The defendants -- that
12 the defendants are prosecuting Mr. McCulley in bad faith and
13 that the commencement of the DEC administrative proceeding
14 was a result of a well-planned scheme orchestrated to
15 challenge Mr. McCulley after winning the appeal reversing
16 his conviction for riding a snowmobile on the Old Mountain
17 Road.

18 We've also shown that the commencement of the
19 criminal action in the Town of North Elba local court and
20 the DEC administrative proceeding were brought by the
21 defendants without hope of obtaining a valid conviction,
22 with no reasonable expectation of obtaining a favorable
23 outcome and I say this with the decision of Halloran
24 presented and the facts that we've established concerning
25 the status of the Old Mountain Road and what the DEC has in

1 the past admitted and agreed with us in certain aspects
2 about the status of the Old Mountain Road. We've also shown
3 that the administrative enforcement proceeding is only one
4 of a multiple of filings charged against Mr. McCulley for
5 violations or alleged violations of using motor vehicles on
6 the Old Mountain Road.

7 We believe we've presented testimony and
8 evidence today to show that the DEC administrative
9 proceeding and even the local court actions, the ones -- the
10 one found in 2005 right before the administrative proceeding
11 and arguably even the one in 2003 were brought to deter or
12 discourage Mr. McCulley's constitutionally protected speech.

13 THE COURT: Is it your view, Mr. Norfolk,
14 that if the plaintiff has demonstrated that the defendants
15 have no reasonable expectation of prevailing on the
16 administrative proceeding, that you -- that that, by itself,
17 satisfies your burden of demonstrating bad faith?

18 MR. NORFOLK: Yes, under the relevant case
19 law in the Second Circuit, that's one of the exceptions to
20 the Abstention Doctrine, having -- that's under
21 extraordinary circumstances, but sometimes referring to
22 where they had no -- yes, they have no hope of obtaining a
23 valid conviction or no reasonable expectation of obtaining
24 an available -- of obtaining a favorable outcome.

25 Shall I continue?

1 THE COURT: Yes.

2 MR. NORFOLK: Okay. We've also shown that,
3 through evidence and testimony, that the DEC brought the
4 administrative proceeding, it followed its normal course of
5 conduct in opposing Mr. McCulley for bein' a proponent of
6 snowmobilin' on the Old Mount Road and favoring
7 Mr. McCulley's -- I'll call 'em political enemies or special
8 interest groups that are in favor of alternative
9 recreation -- outdoor recreational activities such as
10 cross-country skiing and hiking. In fact, I pose to the
11 Court that we proved extraordinary circumstances warranting
12 intervention of the DEC --

13 THE COURT: What's DEC supposed to do? If
14 they favor Mr. McCulley, then they're gonna get a lawsuit
15 from Mr. Goodwin, presumably.

16 MR. NORFOLK: If they favor Mr. -- well, I
17 don't think they need to favor either. I think they
18 should --

19 THE COURT: Well, if they allow Mr. McCulley
20 to operate his snowmobile and motor vehicle on the road,
21 then presumably the Adirondack Ski Touring Council is going
22 to claim that they're favoring Mr. McCulley.

23 MR. NORFOLK: And I understand that. But the
24 Adirondack Ski Touring Council has operated bulldozers and
25 other vehicles on the Old Mountain Road with no recourse of

1 the DEC. In fact, the DEC said it's not our problem. But
2 now, with Mr. McCulley, after he made it known to the DEC in
3 2002, early 2002, that --

4 THE COURT: But I think the case law, the
5 issue is whether or not Mr. McCulley's political opponents
6 instituted the charges here. What evidence is there to
7 support your claim that they instituted anything here?

8 MR. NORFOLK: We've submitted as evidence
9 letters from the Adirondack Ski Touring Council, I believe
10 it's in evidence, there's a lot there, showing its
11 favoritism -- showing its position on the Old Mountain Road.
12 We've had testimony from Mr. Goodwin that he made it clear
13 to the DEC that they opposed snowmobiles on the Old Mountain
14 Road.

15 THE COURT: But the institution of the
16 charges here, what evidence is there to show that any of his
17 opponents did anything to institute charges here? Filed a
18 complaint? Had a conversation? Sent a letter? Anything.

19 MR. NORFOLK: The -- I believe that the
20 evidence and the testimony was that the DEC were informed by
21 Adirondack Ski Touring Council -- by the Adirondack Council
22 that the -- you must stop Mr. McCulley, and Mr. Goodwin is
23 quoted to say I'm sure the DEC would appeal in a public news
24 article. They would appeal if they had lost. There was --
25 the special interest groups, the Adirondack Ski Touring

1 Council in particular, were making it public knowledge that
2 they want -- that they wanted this road to be their road and
3 they made it publicly known to the DEC, for the DEC to know,
4 that they wanted whatever they could do to stop this. And
5 they said sure, we'll do appeal. But there was no appeal.
6 And there's newspaper articles I asked the Court to review
7 and I'm sure you will that Mr. Goodwin is quoted in almost
8 everyone that Mr. McCulley is quoted in. I'm sure they're
9 gonna appeal, they have to do somethin', and what they
10 didn't appeal, they brought it in administratively.

11 THE COURT: Well, Mr. Goodwin said he was
12 sure they'd appeal and they didn't, doesn't that disprove
13 your case?

14 MR. NORFOLK: No. Well, it shows that
15 they -- that was just one of my quotes, but there's more in
16 there. It shows that they're publicly tellin' the DEC that
17 they believe they should take some kind of legal action to
18 prevent Mr. McCulley from takin' on this legal -- this legal
19 venture.

20 Now, I cannot say that Mr. Goodwin and the
21 Adirondack Ski Touring Council came up with this civil
22 administrative proceeding idea. The DEC did that. We heard
23 that today from Mr. Davies. Mr. Davies, frankly, I think
24 didn't give us a reason or one that made sense. So, I
25 cannot say that the public enemies, if you will, the

1 opposition (unintelligible) of Mr. McCulley came up with the
2 DEC administrative proceeding idea.

3 Continuing on, but I -- if you look at all
4 the facts, all the circumstances of this road and of the
5 contentious personal conflict between the department,
6 specific defendants, specific DEC employees were named
7 defendants herein, you'll find extraordinary circumstances
8 are warranting here that intervention in the DEC
9 administrative proceeding in that by reason of bias against
10 Jim, Mr. McCulley, the DEC is an incompetent state to
11 adjudicate -- state agency to adjudicate the issues pending
12 before it in the administrative proceeding against
13 Mr. McCulley.

14 Despite the erroneous assertion in
15 defendant's prehearing memorandum, it's pretty clear today
16 all the defendants, except for the Commissioners, who we
17 didn't ask to come and they weren't here, know Mr. McCulley,
18 they know Mr. McCulley very well. There were times when
19 they just had uneventful public hearings, but there were
20 several times we've heard where they had confrontations and
21 they were not commenced or instigated, how you look at it,
22 by Mr. McCulley.

23 We've established proof of verbal assaults
24 and public confrontations. Mr. Messenger, The Smokehouse,
25 after the public hearing.

1 THE COURT: Wasn't that after Mr. McCulley
2 referred to the Commissioner as a loon?

3 MR. NORFOLK: I think he referred to him --
4 she won the number one loon award.

5 MR. MCCULLEY: I said she won --

6 THE COURT: All right. Let your lawyer
7 speak, Mr. McCulley. You gotta stay out of this one.

8 MR. NORFOLK: (Unintelligible).

9 THE COURT: I thought I'd help you.

10 MR. NORFOLK: Thank you. You could even
11 concede, yes, he spoke out against public officials, but he
12 didn't do it in a confrontational -- confrontational,
13 threatening manner. He did it in a public forum, which that
14 was the whole point of that meeting was. And it was free
15 speech, First Amendment protected speech. And as you look
16 at the speech -- the speeches that were -- his,
17 Mr. McCulley's statements and speeches admitted into
18 evidence, you're gonna see that that's protected First
19 Amendment speech.

20 THE COURT: No question. Why isn't
21 Mr. Messenger's response simply a response in kind?

22 MR. NORFOLK: A response -- not when he comes
23 and invades his personal space, uses profanity and attacks
24 him --

25 THE COURT: Mr. McCulley himself testified he

1 didn't feel threatened.

2 MR. NORFOLK: But -- well, he didn't feel --
3 maybe Mr. Messenger's intent, I think we can interpret from
4 this, you go up and scream and yell and use profanity, say
5 stuff that was testified today, that there is an intent to
6 threaten or to lash out, in the course of his employment, as
7 a DEC rep, and to Mr. McCulley.

8 Now, Mr. McCulley didn't raise his voice and
9 shoot -- holler and then get into his personal space, and
10 then Mr. McCulley didn't proclaim policy decisions on his
11 First Amendment speech. Mr. Messenger says you're gonna get
12 nothin' from us for snowmobile trails. That's not how the
13 DEC, I understand, or any state Government is supposed to
14 make policy decisions. Sounds to me, if you listen to the
15 evidence and testimony, that position was you're not getting
16 anything, you just pissed me off, excuse me -- excuse my
17 language, but you just upset me, you just -- I don't agree
18 with what you said in a public hearing, which he has every
19 right to do, and you're gonna get nothin' from the DEC.

20 There were also evidence, testimony of
21 threats of arrest. I heard -- you heard it from
22 Mr. McCulley. Ranger LaPierre said, well, I'm not sure it
23 was a threat. But I advised that he could be arrested and I
24 contend for no legitimate purpose. If they were actually
25 violating something in hiking in the High Peaks, and this is

1 after he had -- he had won on appeal, he had won on appeal
2 and had talked to the press, they're watchin' him. He was
3 up in the Adirondacks High Peaks taking photographs and
4 measuring. Then he was confronted by Forest Ranger
5 LaPierre. Mr. McCulley testified that I -- he threatened me
6 twice to arrest me for doing that. But nothing came of it.
7 In fact, you can see there's e-mail in there, independence's
8 it's kinda -- frankly, I don't understand it, from Dave
9 Winchell from the DEC, says, well, they could have been
10 surveying, it's not defined, but there's possibly a
11 violation there. Well, I think a law enforcement agent,
12 officer, law enforcement officer, I know, should behave
13 differently when approaching citizens and going making
14 threats. Why are they making these threats? Because the
15 truth tells the matter. The photos and the measuring were
16 to speak out against hikers, cross-country skiers and those
17 advocates which had earlier said, hey, look at the
18 snowmobilers, they make a mess, and they were showin' the
19 hikers make a mess. There is huge erosion and problems with
20 hiking trails, with these unmotorized recreational
21 activities, and the DEC knew that they were makin' a -- they
22 were probably gonna make a big stink about this and counter
23 what happened when the political enemies had presented to
24 the DEC with respect to the ATVs and snowmobiles.

25 Indeed, I think the evidence and testimony

1 which was -- frankly, was uncontroverted, uncontradicted,
2 from Mr. McCulley, there's a past history of criminal
3 conflict between Mr. McCulley, the department as a whole,
4 but also Tom Martin, Stu Buchanan and Forest Ranger
5 LaPierre.

6 MR. MUNRO: Your Honor, I'll object.
7 Criminal conduct?

8 MR. NORFOLK: I didn't say -- did I say
9 criminal?

10 THE COURT: This is argument. I'll hear him.

11 MR. MCCULLEY: You did say criminal.

12 MR. NORFOLK: I didn't mean criminal conduct.

13 THE COURT: You said it.

14 MR. NORFOLK: I meant to say personal
15 conflict. Sorry. Personal conflict between Mr. McCulley
16 and the defendants I just mentioned.

17 And you gotta remember, while defendants
18 claim Mr. McCulley invited Forest Ranger LaPierre to ticket
19 him, invited the DEC Attorney Lacombe to prosecute
20 Mr. McCulley for operating the truck on his Old -- on the
21 Old Mountain Road, that's not what happened. They called
22 Mr. McCulley and he testified the last thing he wanted to do
23 in May of 2005 was get ticketed again, arrested or sued by
24 the defendants.

25 Now, I know what you may be thinking, Judge,

1 and so was I when I -- when Mr. McCulley came and explained
2 this case to me. Why did you go? Why did you go then? Why
3 did you agree to drive your truck on the Old Mountain Road
4 in front of this forest ranger the next day? Well, he -- as
5 he testified, Mr. McCulley spent thousands and thousands of
6 dollars in legal fees, hundreds of his hours of his own man
7 time to discover that the Old Mountain Road, that's
8 according to the DEC's own FOIL request response, was still
9 a town highway, still a town right-of-way. So, why did he
10 show up? He's standin' up for what he believed in.

11 Now, earlier, opposing counsel said, well,
12 ask Mr. McCulley if -- well, has your First Amendment speech
13 been chilled? You still talkin'? Well, the issue here, I
14 think, is is the DEC tryin' to deter -- one of the issues
15 here is tryin' to deter his First Amendment speech and I
16 think the other issues here, they're upset with vindictive
17 and illegitimate motives against Mr. McCulley because he's
18 standin' up for what he believes in. He won't stop. I
19 commend him.

20 So, you also have to remember he endured
21 verbal confrontations and threatening encounters,
22 encounterings before this. We talked about 'em. The
23 stopping and asking him if he operated a backhoe on the Old
24 Mountain Road. He lives seven miles away, he testified. I
25 don't know why he would bring a backhoe up there. No

1 investigation was made after that, but they asked him if he
2 did it. And Mr. McCulley testified, well, forest ranger
3 said everyone at Raybrook and Tom Martin believes if
4 something goes on that you're at fault on the Old Mountain
5 Road.

6 THE COURT: Well, in fairness, Mr. LaPierre's
7 testimony was not to that affect.

8 MR. NORFOLK: Correct. Specifically said "I
9 didn't say Tom Martin."

10 THE COURT: No. He specifically said they
11 asked him if something goes on up there, Mr. McCulley would
12 probably know about it. That's a little different.

13 MR. NORFOLK: Okay. I -- I was under the
14 impression that I think he actually responded twice, and as
15 a lawyer, it's probably my fault, the first time he
16 responded he said I didn't say Tom Martin, I didn't include
17 Tom Martin.

18 THE COURT: Right.

19 MR. NORFOLK: I asked him again and he did
20 state that, I concede that.

21 Now, after dedicating substantial money and
22 time, as I was talking earlier, and successfully beating the
23 charge against him and fighting with all his heart for what
24 he believed in, Mr. McCulley was challenged. He was dared.
25 Is it a subjective point of view from him whether he's

1 harassed or not? But I believe you can objectively look
2 back as a trier of fact and say he was antagonized by the
3 DEC with that phone call without solicitation. I "hear
4 you're gonna ride on the Old Mountain Road. Let's get it
5 done." So, I contest that that right there is proof of
6 illegitimate motivation to commence -- to get the ball
7 rolling to commence an action against the guy by a DEC
8 official, a law enforcement officer.

9 And it was only months after he had just won
10 his appeal and it was on the same road, same set of
11 circumstances, except for he didn't ride into -- drive all
12 the way into the Town of Keene; instead of a snowmobile, he
13 had a truck. But this is what I -- and I think the Court
14 noticed this. You gotta look at all these facts, Joe
15 LaPierre's testimony as established, called up Mr. McCulley
16 the day before he arranged to meet with him. Forest Ranger
17 LaPierre admitted that he went that day before Mr. McCulley
18 and put up signs, put up no motor vehicle signs. Yes, you
19 can say it's part of policy to put 'em up. I tend to --

20 THE COURT: Well, wait a minute. As to what
21 Mr. LaPierre testified to, according to him the sign that
22 was up already, which is underneath -- that's a whole
23 another question -- but, it's underneath the sign that he
24 put up that morning. The sign that was up already is the
25 sign that contained the statement no motor vehicles.

1 MR. NORFOLK: I respectfully -- I
2 respectfully ask you to review that. That is not the
3 testimony. And that -- it was not the testimony of Ken
4 Jubin and I respectfully ask the Court to review that,
5 because I am in complete disagreement with you on that.

6 THE COURT: All right. I'm holding up
7 Defendant's -- part of Defendant's Exhibit -- this looks
8 like 3.

9 MR. NORFOLK: Yes, I understand.

10 THE COURT: You have that picture?

11 MR. NORFOLK: Yes, I do.

12 THE COURT: I'm gonna point here.

13 MR. NORFOLK: Okay.

14 THE COURT: As I understood Mr. LaPierre's
15 testimony -- I'm not sayin' whether it's credible for not
16 because it's in some conflict with Mr. Jubin, whether it's
17 credible or not, just so I understand what you think his
18 testimony was, there's three signs on that pole, correct?

19 MR. NORFOLK: Yes, your Honor.
20 (unintelligible).

21 THE COURT: My recollection of his testimony
22 is that Mr. LaPierre put up the top sign, which covered part
23 of the sign underneath it, which had already been there.

24 MR. NORFOLK: Right.

25 THE COURT: He put up the bottom sign about

1 the bikes.

2 MR. NORFOLK: Right.

3 THE COURT: The sign that had already been
4 there underneath the first sign he put on is the part that
5 contains the statement about no bikes --

6 MR. NORFOLK: Okay.

7 THE COURT: -- or no motor vehicles.

8 MR. NORFOLK: I disagree with you, your
9 Honor.

10 THE COURT: What's your recollection?

11 MR. NORFOLK: With that -- I'd like -- I
12 specifically asked Mr. Jubin about that on the record. I
13 asked him I think more than once. This is my recollection
14 and complete understanding is if you look closely, there are
15 actually four signs on the tree. You see the lip of the
16 yellow sign, if I may.

17 THE COURT: Oh, yes, I do.

18 MR. NORFOLK: And I asked him specifically
19 what sign was there? He said a forest preserve sign and I
20 asked him specifically, 'cause I thought that was an issue,
21 and I think it was on the record, I pointed out, I asked him
22 and read whether no motorized equipment, no motorized
23 vehicles, et cetera, were on that sign that was there. He
24 says no, it was just a forest preserve sign, an old rusty
25 forest preserve sign.

1 THE COURT: All right.

2 MR. NORFOLK: And I'm -- the record, I'm
3 sure, will reflect that.

4 THE COURT: No, I understand.

5 MR. NORFOLK: So, with that said, I -- when I
6 discovered this, I -- frankly I could not find -- I could
7 not think of any better evidence which establishes and
8 indicates singling out motive here, a singling out of Jim
9 McCulley. Call him up, go over, put the signs up, have him
10 drive on the road, give him the ticket, haul him into the
11 DEC administrative proceeding. That does not sound right.
12 I contest to you that is in bad faith, that is a
13 harassment -- or retaliatory grounds and it shows a personal
14 conflict or at least some sort of bias on the part of the
15 defendant, the agency, against Mr. McCulley. It shows an
16 illegitimate motive. They're going -- they're going to set
17 the scenario, call him up, put the signs up, get him to
18 drive through it. Singling him out. Why didn't they do
19 someone else? I don't know. I never asked that question.

20 THE COURT: Well, maybe because
21 Mr. McCulley's the one who voluntarily showed up on
22 May 21st.

23 MR. NORFOLK: Perhaps. Evidence we presented
24 also exposed the defendants' inconsistent position on the
25 status of the Old Mountain Road. I think -- and how it

1 deemed the Old Mountain Road to be a public highway or a
2 town road or at some time something else. But all the way
3 up into 2002, the record established that they considered
4 the Old Mountain Road to be the Town of Keene, Town of North
5 Elba's jurisdiction.

6 THE COURT: When you say "they," you're
7 referring to DEC?

8 MR. NORFOLK: The DEC.

9 THE COURT: All right.

10 MR. NORFOLK: Okay? 2002 comes around,
11 Mr. McCulley, after talking to Jim Jennings, the snowmobile
12 association president, learning that it could possibly be a
13 connector route, there's evidence here that because he went
14 to Tom Martin and asked, "Hey, let's open this up," months
15 later, coincidentally, they started sayin' -- they started
16 callin' into question the Old Mountain Road. They start --
17 they did, there's letters in there sayin' there's an issue
18 of the Old Mountain Road, and every year, decades since,
19 back to the '70s, they state it's a town road.

20 THE COURT: What is the state of the record
21 as to the latest date on which anyone from DEC referred to
22 the road, the Old Mountain Road, as a town road?

23 MR. NORFOLK: November 2004.

24 THE COURT: Where's that?

25 MR. NORFOLK: Christopher Lacombe, order on

1 consent, that he sent to Ken Jubin's attorney. You recall
2 Mr. Jubin spoke, was very familiar with the Old Mountain
3 Road --

4 THE COURT: I thought that was an
5 acknowledgement that the road was likely created by statute,
6 not that it was a town road.

7 MR. NORFOLK: That was another letter that
8 was in evidence. I think it was prior to the order on
9 consent, LaPierre concedes that probably --

10 MR. MCCULLEY: Lacombe.

11 MR. NORFOLK: Lacombe conceded to Jim Brooks,
12 Ken Jubin's attorney, it appears possibly, I think he used
13 that kind of language, the Old Mountain Road was created by
14 statute, this 1805, 1812 statute. The order on consent is
15 attached to a different letter, and it's there, there's a
16 lot there, but I know this in and out, that order on consent
17 states the Old Mountain Road is a road, town road -- I think
18 it says by use, town road by use, allowing motor vehicle
19 passageway, to pass through. It also states the Old
20 Mountain Road traverses through great lots, and it names
21 'em. What's important about great lot 146 and 153, those
22 are right next to the town borders -- borderline between
23 Keene and North Elba. I asked Mr. Lacombe specifically to
24 point out on the DEC map where the Old Mountain Road goes
25 through and he says 146, 147.

1 If you recall, Ken Jubin is there and saw
2 Mr. McCulley where he operated his pickup truck and I asked
3 him what great lot it was and he said 146. The order on
4 consent of November of 2004 that Mr. Lacombe sent to Ken
5 Jubin's attorney states the Old Mountain Road is the Town of
6 North Elba highway, says it's open to motor vehicle use only
7 and then it proceeds to say the Old Mountain Road crosses
8 130 -- 143, 146, 153. So, they are -- November of 2004,
9 months before they commence a criminal action and
10 enforcement proceeding against Mr. McCulley, and a year or
11 so after they prosecuted him in criminal court for
12 snowmobile riding, they're now saying in that document that
13 went out to another attorney that the Old Mountain Road is a
14 north -- Town of North Elba right-of-way, open to motor
15 use -- motor vehicle use passage and specifically said that
16 on great lot 146 where we know that that's where he was
17 operating his vehicle.

18 THE COURT: Okay.

19 MR. NORFOLK: And I should note that he also
20 said 153, which goes beyond where Mr. McCulley operated his
21 vehicle. So, there's no question of whether he was on a
22 paved road or not or Mr. Lacombe was only talking about the
23 point nine or not. He discussed all the way to the town
24 line, which is great lot 153, that it's the Old Mountain
25 Road, and he said motor vehicle use is not prohibited.

1 We established that the defendants knew
2 that -- knew or perhaps turned a blind eye to the Adirondack
3 Ski Touring Council's installation of bridges, culverts and
4 other water and drainage devices, the cutting down of brush
5 and trees and other vegetation, manipulation of beaver dams,
6 use of chain saws. Mr. Goodwin testified he's usin' chain
7 saws all through the year presently. There's no recourse --
8 I asked him whether he was being prosecuted or been
9 questioned by the DEC? No, he has not.

10 We also showed that the Adirondack Ski
11 Touring Council is using bulldozers on the Old Mountain
12 Road.

13 THE COURT: What do you contend that evidence
14 proves?

15 MR. NORFOLK: It proves, one, that the Old
16 Mountain Road is -- the entire Old Mountain Road is a town
17 road or town highway right-of-way, because they, in their
18 papers, on several occasions -- "they" meaning the DEC,
19 they -- when confronted with that about complaints --

20 THE COURT: I understand that point.

21 MR. NORFOLK: Okay.

22 THE COURT: But you have other --

23 MR. NORFOLK: And the other point is -- so
24 that establishes that. Well, they know it's a town highway
25 road, they always have. So why aren't they prosecuting

1 them? They have no -- they have no -- they have no hope to
2 obtain a victory. They didn't win it in County Court. They
3 knew -- they testified today they -- well, we'll lose --
4 Mr. Hamm said well, we'll probably lose in the same court.
5 And they -- the other thing that it points out is they're
6 allowing some people, members of the public, to operate
7 motorized vehicles, like say the bulldozer. I think the
8 bulldozer is worse than a pickup truck or a snowmobile. I'm
9 not an expert in environmental damage, you know, whether a
10 big truck is --

11 THE COURT: Well, it's not exactly motor
12 vehicle traffic. It's on a single day for purposes of
13 maintenance.

14 MR. NORFOLK: Without a permit. So --

15 THE COURT: True.

16 MR. NORFOLK: So --

17 (Pause in proceedings.)

18 MR. NORFOLK: I'm just gonna wrap it up. I
19 think -- I had -- have answered a lot of the questions we
20 have here. But, you know, I think where this really opened
21 up is when Mr. McCulley stumbled upon the fact that the Old
22 Mountain Road is a town road and the DEC deemed it as such
23 in the '90s. And maybe there's a personal conflict between
24 Tom Martin and Mr. McCulley, but I think I should point out,
25 in my opinion, Mr. Martin didn't answer anything. And it's

1 surprising that he had no recollection of events that we
2 then showed him that he was involved with. I think that the
3 Court should consider that and Mr. Martin's, in my opinion,
4 lack of cooperation and dishonesty on the stand.

5 (Pause in proceedings.)

6 MR. NORFOLK: So, in closing, I think there's
7 enough here, or more than enough here, of evidence of
8 personal animus between the defendants, named defendants,
9 including the department as a whole, there's proofs of --
10 proof of illegitimate motives here, bringin' Mr. McCulley
11 into the civil administrative proceeding, but also to even
12 file the action against him in the town court in '05, the
13 way he went about it, that's evidence of we're gonna go
14 after him, shootin' his mouth off, he won -- he's won, he
15 won in the County Court appeal, he's talkin' -- shootin' his
16 mouth off apparently, and in the newspapers, we're gonna
17 bring him in house and he's not gonna win. Why weren't you
18 gonna go in the Town of North Elba, Town of Keene? Well,
19 we're gonna lose at the County Court. Those -- that right
20 there, that's a reason, an exception to the abstention
21 doctrine, which, frankly, I don't think apply here in the
22 first instance. We had testimony about state interests.
23 According to Gabrielle Dunn, who is now Gabrielle DeMarco
24 that was put in, public statement to the Press Republican,
25 we don't see this decision as having any precedent in the

1 forest preserve. Okay. I -- that, to me, is an admission
2 that this isn't really that state important interest. It
3 deals with one road and one individual at the time.

4 Well, now they've changed that, changed that
5 position. The DEC has also testified -- excuse me, we've
6 also had testimony today that the DEC accepts public
7 comments from all over the nation, not just New York State,
8 in making their land use policy and forest preserve
9 policies, including the Sentinel Range Wilderness area.
10 That's important. It's not just -- if any important. It's
11 not just -- if any kind of interest that this has, of
12 magnitude, it's not just state interest, it's a national
13 interest.

14 And while I'll rest on my memorandums of law
15 that I've submitted to Judge Kahn, I'm sure you have --

16 THE COURT: Yes.

17 MR. NORFOLK: -- with respect to the other
18 reasons why and under Pullman abstention doctrines do not
19 apply, and apart -- when I say law, I know the
20 administrative proceeding. Mr. McCulley is not going to be
21 able to bring his claims, each and every claim that he has
22 here, in that administrative enforcement proceeding. Now
23 you can say well they're gonna be heard on affirmative
24 defenses. I say -- I venture not to agree with that. And
25 will they be adjudicated? Will his claims here be

1 adjudicated in the state administrative enforcement
2 proceeding? No. He's not gonna get the relief requested,
3 he's not gonna get any kind of monetary damages awarded in
4 the administrative proceeding. On appeal, assuming he will
5 lose in the administrative proceeding, because he cannot
6 bring those claims in that administrative proceeding,
7 they're not gonna be preserved for the record on Article 78.
8 And there's case law out there which I cited to in my memos
9 of law where he cannot get the claims adjudicated and the
10 damages he's requestin', we don't have the three prongs of
11 the Younger abstention, Younger abstention doctrine.

12 THE COURT: Is it your understanding that
13 that part of the case is before me on the referral order
14 from Judge Kahn?

15 MR. NORFOLK: If I need to pull that out, I
16 will pull that out.

17 THE COURT: My understanding of the order is
18 he referred it to me for a hearing and a report and
19 recommendation on the issue of the bad faith exception.

20 MR. NORFOLK: If you would give me a
21 second --

22 THE COURT: Well, you can look at it in a
23 minute when Mr. Munro speaks. My other question is what's
24 the status of the administrative proceeding? Is there a
25 hearing date set?

1 MR. NORFOLK: No. I -- when the -- when he
2 was served on the summons -- notice of hearing and the
3 complaint, he came to me, I came to the federal court and
4 asked for a preliminary injunction, okay. The preliminary
5 injunction I asked for was in the meantime, until that's
6 decided, that the administrative hearing be stayed. Judge
7 Kahn did not order that part of my relief. So, I had to put
8 in, I was compelled (unintelligible) to put in an answer to
9 the administrative enforcement proceeding. Since then,
10 shortly thereafter, the DEC and the -- the DEC agreed to
11 stay that proceeding pending the outcome of this proceeding.

12 There is case law out there that could
13 stay -- that favors the plaintiff. However, I have not
14 raised those because I think it was a gratuitous move on
15 their part to attack that -- well, I guess I kinda have just
16 now.

17 THE COURT: All right.

18 MR. NORFOLK: So I think there's a lot been
19 said here and I think just looking at it, there are
20 exceptions to the Younger and Pullman doctrines, bad faith,
21 no likelihood of obtaining or reasonable expectation of
22 obtaining success in the criminal courts, I am gonna say
23 also in the administrative proceedings, and I will not give
24 my personal opinions on his likely -- his chances there.
25 But, in the alternative, I will say there's an extraordinary

1 circumstance here, there is one, if Younger and Pullman
2 apply, because the DEC, by reasons of bias, as evidenced
3 through the proof here, similar to -- if you look at Cullin,
4 I don't have the cite. There is a Cullin case in the Second
5 Circuit, it's something that they show personal conflict,
6 history of personal conflict, and personal animus, there's
7 grounds there. And I believe we have it here.

8 THE COURT: All right. Thank you.

9 MR. NORFOLK: Do you want me to look at the
10 Judge Kahn order?

11 THE COURT: You can if you want. I will hear
12 from you on rebuttal if you have anything to say, but I want
13 to hear from Mr. Munro.

14 Mr. Munro.

15 MR. MUNRO: Thank you, your Honor. The
16 underlying dispute between the parties is the legal status
17 of what DEC refers to as the Jack Rabbit Trail and what
18 Mr. McCulley refers to as the Old Mountain Road. The
19 resolution of that question, the legal status, will
20 determine whether Mr. McCulley and the public in general can
21 legally use snowmobiles and motor vehicles on the trail.

22 DEC believes that dispute should be decided
23 in the pending DEC administrative enforcement proceeding.
24 And as you know, we need to dismiss the federal action on
25 the grounds of abstention so that the DEC proceeding can

1 continue.

2 THE COURT: And --

3 MR. MUNRO: Mr. Norfolk noted, we have agreed
4 to stay that pending the ruling by the federal court.

5 The underlying dispute is not before your
6 Honor, in our view. Instead, what Judge Kahn has asked you
7 to do is examine a much narrower question, and that question
8 is whether the so-called bad faith or other exceptions to
9 abstention are supported by the facts here.

10 More specifically, and let me run through
11 three different components to these exceptions, first,
12 Mr. McCulley has to show that DEC has no reasonable
13 expectation of obtaining a favorable outcome in its June '05
14 administrative enforcement proceeding.

15 He has to show that the proceeding was
16 initiated with and is animated by retaliatory, harassing or
17 other illegitimate motive. Or he has to show that there are
18 other extraordinary circumstances, as that phrase has been
19 described by the Supreme Court. If I could go through each
20 of them.

21 THE COURT: Do you agree that if I and Judge
22 Kahn conclude that the plaintiff has shown that the
23 defendants have no reasonable expectation of prevailing in
24 the administrative proceeding, bad faith is established?

25 MR. MUNRO: I think bad faith is broader than

1 that, your Honor. If you look at the current --

2 THE COURT: What's the answer to the
3 question?

4 MR. MUNRO: The answer is no, you need to
5 conclude more than that.

6 THE COURT: What else?

7 MR. MUNRO: You need to also conclude
8 personal animus and harassment. I think the Kern v. Park
9 (phonetic) decision makes that clear.

10 THE COURT: All right. Is animus inferable
11 from a proceeding commenced without any reasonable
12 expectation of prevailing?

13 MR. MUNRO: I do not think it is. And I
14 think -- we cited the Schlager (phonetic) decision, the
15 Second Circuit decision in our prehearing memo. In
16 Schlager, the District Court found that the criminal statute
17 that was being prosecuted by the DA was unconstitutional.
18 It found there was no personal animus, in terms of the
19 prosecution, but that because the statute was
20 unconstitutional, that constituted bad faith as a matter of
21 law.

22 The Second Circuit reversed and it said two
23 things: You've got to show animus either way. But beyond
24 that, the fact -- they criticized the District Court because
25 the District Court had relied on one single state court

1 decision, a New York Appellate Division decision which had
2 determined that the criminal statute was unconstitutional.
3 The Second Circuit said absent a controlling decision by the
4 New York Court of Appeals, or the U.S. Supreme Court, then
5 there's no bad faith. I am relying on a more particular
6 decision, but there has to be personal animus as well.

7 THE COURT: Well, I mean, it's possible that
8 someone else might not read that holding as broadly as you
9 do. That's an issue of constitutionality. This is an
10 issue -- the issue presented here is whether or not there's
11 a likelihood of prevailing. And right now, you have two
12 court decisions against you.

13 MR. MUNRO: Well, we have --

14 THE COURT: On the record in this case.

15 MR. MUNRO: Well, we have one Court decision
16 in a criminal case, the Judge Halloran decision.

17 THE COURT: Correct.

18 MR. MUNRO: I don't know about the second --

19 THE COURT: I thought there was the 1950s
20 case from Paul Smith that said it's a creation by statute
21 which is contrary to your position?

22 MR. MUNRO: Well, that may be. I'm not
23 familiar with that decision. Judge Halloran I do not
24 believe relied on that decision in his decision --

25 THE COURT: Correct.

1 MR. MUNRO: -- the decision from 1953.

2 If I could go through each of these grounds?

3 THE COURT: Yes. But I want to spend some
4 time on reasonable expectation of prevailing.

5 MR. MUNRO: Well, that's where I'll start.
6 As I understand the Diamond Deed (phonetic) decision and the
7 other Second Circuit controlling case law, Mr. McCulley has
8 to show that DEC has no reasonable expectation of obtaining
9 favorable outcome in its June -- the administrative hearing
10 that was initiated June '05. You don't have to decide that
11 DEC will win or lose. As I understand the case law, you
12 have to determine that DEC was a colorable claim, a
13 nonfrivolous claim really.

14 Now, we have heard that there are great
15 complicated issues here of New York real property law, roads
16 created by statute, roads created by use, what abandonment
17 means, et cetera. This was not in the testimony, but I
18 don't think the other side would deny the fact that when
19 Judge Halloran issued his decision, a lot of his reasoning
20 about statutes created in 1810 and 1812, neither side had
21 briefed those issues. Judge Halloran went off on his own.

22 THE COURT: Tell me what the proof will be at
23 the administrative hearing that this violation occurred on
24 state land.

25 MR. MUNRO: DEC will prove that Mr. McCulley

1 drove his pickup truck on state land.

2 THE COURT: On the road.

3 MR. MUNRO: On the trail.

4 THE COURT: On the trail which another Court
5 has previously found was town -- a town road, correct?

6 MR. MUNRO: Are we talking about the Judge
7 Halloran decision?

8 THE COURT: Yes.

9 MR. MUNRO: Well, again, Judge Halloran -- I
10 don't know how much -- he did find that, yes. I don't know
11 how much --

12 THE COURT: Well, how are you gonna prove it
13 in this proceeding? It's an issue. The defendant -- the
14 defendant. Mr. McCulley has raised it in the administrative
15 proceeding. How are you gonna prove it?

16 MR. MUNRO: That this is state land or --

17 THE COURT: Yes.

18 MR. MUNRO: -- that it's a road?

19 THE COURT: That it's state land. I assume
20 you're -- your contention is that it's abandoned and became
21 state land.

22 MR. MUNRO: That's right.

23 THE COURT: Under what theory was it
24 abandoned?

25 MR. MUNRO: The state land issue is separate

1 from the abandonment issue. I mean, the proof at the
2 hearing, I believe -- I won't be doing it, but the proof at
3 the hearing will be that whatever the status of this road
4 was in the 1970s or the 1980s or the 1990s, that it was
5 abandoned because it was not maintained as a public highway
6 by anybody.

7 Now a related issue to that is who owns the
8 fee here? And I think that relates to the issue is this
9 creation of a road by statute or use.

10 THE COURT: If it's a town road, you have no
11 case in the administrative proceeding, do you agree?

12 MR. MUNRO: If it's a town road that has not
13 been abandoned?

14 THE COURT: Yes.

15 MR. MUNRO: I think that's right.

16 THE COURT: If DEC took the position after
17 1972 or 1987, or whatever DEC's position is today on when it
18 was abandoned, how can you prove abandonment? DEC was
19 taking the position in the '90s certainly and probably into
20 the 2000s that these were town roads.

21 MR. MUNRO: I don't concede in the 2000s,
22 Judge. There is a 1995 letter from a regional forester --

23 THE COURT: Okay.

24 MR. MUNRO: -- 1996 letter from a regional
25 forester, that was 10 years ago.

1 THE COURT: We've heard testimony from both
2 towns, or at least the Town of Keene and from Mr. Jubin,
3 who doesn't represent the Town of North Elba, but he sounded
4 as if he did, that neither town had maintained this road
5 slash trail since at least 1995. Are you -- does the DEC
6 contend that abandonment occurred in accordance with Highway
7 Law 205?

8 MR. MUNRO: I'm not familiar with all the
9 ministerial requirements of directive 205, but DEC does
10 contend that because there's been no maintenance of this
11 road for at least six years, that this road has been
12 abandoned as a matter of fact and law.

13 THE COURT: Do you agree that Mr. Lacombe
14 testifies that he believes abandonment occurred in
15 accordance with Section 205?

16 MR. MUNRO: I believe he did, your Honor.

17 THE COURT: All right. Section 205(1)
18 requires, among other things, a resolution by the town board
19 for there to be an abandonment of the town road. There is
20 no such resolution in the record here from either Keene or
21 North Elba, correct?

22 MR. MUNRO: I believe that's right, your
23 Honor.

24 THE COURT: Is that what you consider a
25 ministerial act?

1 MR. MUNRO: Well, again, this goes back to
2 who owns the fee. If the towns own the fee --

3 THE COURT: Mr. Munro, is it a -- is that the
4 ministerial act to which Mr. Lacombe refers?

5 MR. MUNRO: I'm not certain, your Honor.

6 THE COURT: All right. I mean, if you
7 consider that a ministerial act, you have to agree with the
8 proposition that if I accept -- if you accept the
9 contentions of Mr. Lacombe and Mr. Hamm that this road was
10 abandoned in 1972 or 1987, and that all acts since then,
11 including acts within the Statute of Limitations, by anyone
12 on a motor vehicle, violated those state law provisions,
13 even with no notice to anybody, with no action by the town,
14 with no action of any kind. Simply, today, you take the
15 position that back then it was abandoned. You agree?

16 MR. MUNRO: I think I do, your Honor.

17 THE COURT: And you believe DEC has that
18 power, notwithstanding the provisions of the statutes?

19 MR. MUNRO: Well, again, ultimately, I'll let
20 DEC decide that, but I think they do.

21 THE COURT: Frankly, somebody may well hold
22 that some day, but to me. It's a startling proposition.

23 MR. MUNRO: Well, there's a lot of history
24 here, Judge, as to who owns the road, who owns the fee, what
25 its use has been.

1 THE COURT: And a lot of the conflict is all
2 within DEC. It's a strange record here.

3 MR. MUNRO: Well, there are also no town
4 officials here testifying as to what their position was.
5 There's a town highway person, but no one else.

6 THE COURT: I understand, all right. Please
7 continue.

8 MR. MUNRO: I think that covers reasonable
9 expectation.

10 THE COURT: All right.

11 MR. MUNRO: In terms of whether the
12 proceeding was initiated with or animated by retaliatory,
13 harassing or other illegitimate motive, I don't think that's
14 been established whatsoever. I believe that the evidence is
15 clear that Mr. McCulley invited these prosecutions. Until
16 yesterday, there had been no argument at all about what
17 sounded almost like entrapment today. There was no argument
18 before Judge Kahn or the papers before Judge Kahn that
19 somehow DEC enticed Mr. McCulley to come to the trail and
20 drive his pickup truck. We think just the opposite. He's a
21 zealous advocate and he's trying to test the law.

22 THE COURT: Well, what's your recollection of
23 the record on the -- I believe it's May 21, 2005, incident?
24 First phone call came from Ranger LaPierre, didn't it?

25 MR. MUNRO: Yes.

1 THE COURT: And --

2 MR. MUNRO: And he testified that he had
3 gotten a phone call from another ranger who had been on that
4 day and he told him he had heard, through the grapevine,
5 that Mr. McCulley and others were going to show up at the
6 trail and Mr. Jubin testified to that as well.

7 THE COURT: Right.

8 MR. MUNRO: So Mr. LaPierre simply called him
9 up and said, "What's going on?"

10 THE COURT: Well, how did we get -- how
11 did -- according to Mr. LaPierre's testimony, how did the
12 conversation get from "what's going on" to "I'll see you
13 tomorrow morning at 10 o'clock"?

14 MR. MUNRO: Mr. McCulley said he was going to
15 go to the trail the next day, as I recall. And Mr. --

16 THE COURT: Just -- and according to Ranger
17 LaPierre's testimony, Mr. McCulley simply volunteered that
18 information?

19 MR. MUNRO: I believe he did.

20 THE COURT: Okay.

21 MR. MUNRO: So he showed up and he drove his
22 pickup truck.

23 There has been some testimony about a
24 Mr. Messenger and a conflict in a restaurant. I don't know
25 who Mr. Messenger is, he's not a witness here. He was not

1 at all involved with the decision in 2005 to bring an
2 administrative enforcement proceeding against Mr. McCulley,
3 and so any alleged conflict between those two individuals I
4 think is irrelevant. Certainly has nothing to do with
5 animus or harassment.

6 In terms of extraordinary circumstances, the
7 Supreme Court case law says that the plaintiff must show
8 that the facts, according to the Kubler case (phonetic), the
9 facts must create an extraordinarily pressing need for
10 immediate federal equitable relief. And the Trainer versus
11 Hernandez (phonetic) Supreme Court decision says plaintiff
12 must show that he will suffer, quote, great and immediate
13 harm if the federal court does not intervene.

14 Now, as we understand Mr. McCulley's federal
15 court complaint is primarily based on his First Amendment
16 claim that the DEC enforcement proceeding is -- has impacted
17 his First Amendment rights, is restraining his right to
18 speak out freely. And yet, he conceded that he continues to
19 do so, as is, of course, his right, and, in fact, he spoke
20 at a property rights conference in Albany this past October.
21 The DEC obviously has no bone to pick with regard to his
22 exercising his First Amendment rights. We just want him to
23 obey the law, as we understand the law to be, and we believe
24 that that issue as to what the law is ought to be determined
25 at DEC's administrative enforcement proceeding.

1 THE COURT: All right. Thank you.

2 MR. NORFOLK: I just have a very brief
3 rebuttal.

4 THE COURT: Yes.

5 MR. NORFOLK: Mr. Munro stated that this
6 was -- the scope of this hearing should have been just about
7 bad faith and whether or not there was illegitimate motives.
8 However I have the case of Kern versus Park, United States
9 District Court, Western District of New York case, that
10 supports our whole presentation of evidence here. You have
11 to get somewhat to the underlying issue here about the Old
12 Mountain Road and the status. And just to rebut that, the
13 Western District of New York court, Kern v. Park, stated the
14 party bearing the burden of proof failed to introduce
15 detailed evidence concerning the underlying facts and
16 ultimate dispositions in many of the cases prosecuted by
17 defendants. There was multiple cases there. Here there's a
18 couple. As such, this Court cannot adequately evaluate the
19 merits of those cases to determine whether the defendants
20 had a reasonable expectation of achieving a favorable
21 outcome. This is why we've spent two days here going a lot
22 over the Old Mountain Road and the status and the history of
23 it.

24 THE COURT: I understand. I thought the
25 question that I had for you before was whether or not I can

1 reach the question of the relief available. That's a
2 question for whether the abstention doctrine applies in any
3 event, before you even reach bad faith.

4 MR. NORFOLK: Okay. I have Judge Kahn's
5 order --

6 THE COURT: Yes.

7 MR. NORFOLK: -- and it directs an
8 evidentiary hearing, and, page 2, in the second paragraph
9 down, I quote, the Court hereby orders that an evidentiary
10 hearing be held addressing bad faith and other exceptions to
11 abstention. Parties should be prepared to address the
12 Younger and Pullman doctrines and any exceptions thereto. I
13 see that as addressing the Younger and Pullman abstention.
14 Hence, that's why I have admitted evidence of Gabrielle Dunn
15 going to the second prong whether it's a state interest or
16 not, I understand that has no precedents. That's why I
17 questioned -- I think it was Tom Martin, I think I
18 actually -- I think he responded and said that public
19 comment is accepted from the state and out of state to show
20 the Court it's not -- if anything it's not just a state
21 interest, it's a national interest. It bases its land
22 policy -- the DEC bases its land policy decision making on
23 both in state and out of state members of the public and
24 associations.

25 The only other thing I think I would like to

1 address in -- and to rebut is our complaint has stated all
2 along that the scenario about getting the phone call up and
3 having dared or challenged to go drive his pickup truck on
4 the Old Mountain Road was -- we've alleged that in our
5 complaint since day one that it was wrong, done in bad faith
6 and illegitimate motives. To be honest with you, we just
7 found out not too long ago that Joe LaPierre hadn't put up
8 the -- as the testimony was given, hadn't put up the signs
9 that prohibit motor vehicles 'til that morning. So that's
10 why we brought it up here. I think it's very important to
11 the issues.

12 And lastly, I just want to -- Mr. Munro's, I
13 believe, understanding is that bad faith, you must do --
14 show bad faith and not have a reasonable outcome, and I
15 don't see the case law like that. And I'm quoting from
16 Lamdon v. Construction (phonetic) Federal Courts should
17 still afford injunctive relief to plaintiff upon showing of
18 bad faith, harassment or any other exceptional circumstance
19 that would call for equitable relief.

20 And you know, I think I'm just gonna rest on
21 the case law that's there and ask that -- you to consider
22 our memos.

23 THE COURT: Thank you. Mr. Munro, anything
24 further?

25 MR. MUNRO: Just very briefly, your Honor.

1 Judge Kahn's order says what it says, obviously, but we took
2 the position in our pretrial brief that the threshold
3 question of abstention, whether the three prong test has
4 been met, pending state proceeding, according state interest
5 and adequately protect the defendant's rights in a state
6 proceeding. That's a question of law. We cited some case
7 law on that. And we believe that was fully briefed before
8 Judge Kahn and what is before you is only the factual issue
9 regarding the abstention.

10 THE COURT: I'm not aware -- I'll give
11 Mr. Norfolk a chance to respond, but I'm not aware of any
12 factual issues with respect to the application of the
13 abstention doctrine. It's only with respect to the
14 exceptions to the doctrine that we're here for.

15 MR. MUNRO: That's right and I think
16 (unintelligible).

17 THE COURT: All right. Did you have
18 something else?

19 MR. NORFOLK: No.

20 THE COURT: Let me ask your recollection of
21 Ranger LaPierre's testimony with respect to the signs that
22 he put up on May 21, 2005?

23 MR. MUNRO: Well, I -- first of all, I would
24 suggest that probably what he said is the best recollection.
25 But as I remember it is that when he got there that morning,

1 the only sign up on the tree was the one that is now covered
2 by the new sign on the top.

3 THE COURT: All right.

4 MR. MUNRO: But he also said that in the
5 past, there had been a second sign, similar to that middle
6 one, which said no motor vehicle use of this trail and that
7 that sign had been taken down. And I specifically said to
8 him, "Are signs sometimes removed?" And he said "yes." So
9 I think he testified that only the one sign was there that
10 day.

11 THE COURT: All right. Thank you.
12 Mr. Norfolk, anything else?

13 MR. NORFOLK: No. To be honest with you, I
14 didn't understand when you said I can ask Mr. Norfolk the
15 issue, you're talking about actual --

16 THE COURT: Yeah, there are no factual
17 questions with respect to the application of the abstention
18 doctrine itself, are there?

19 MR. NORFOLK: Well --

20 THE COURT: Simply there are factual
21 questions with respect to the exemption for bad faith.

22 MR. NORFOLK: Well, I contend and I'm lookin'
23 at this Judge's order again, where he ordered in bold
24 that -- he couldn't possibly -- I know that's a legal
25 question, whether abstention applies or not, but yet with

1 any legal question, you have to apply the facts.

2 THE COURT: Well, what facts are in dispute
3 with respect to that? You have been presenting evidence
4 about the relief available. That's not in dispute, is it?

5 MR. NORFOLK: No. No. I -- no. I guess
6 what I was lookin' at is the state important interest, state
7 important interest prong, and I have been contending,
8 submitting evidence here that the state itself admitted it
9 didn't have much of a precedent. That's what I was --
10 that's my approach.

11 THE COURT: All right.

12 MR. NORFOLK: And the public comments from
13 out of state. And so it's not just a state interest. If
14 anything it's a national interest, or no interest at all.

15 THE COURT: All right. Thank you.

16 MR. NORFOLK: Thank you.

17 THE COURT: Thank you. Decision is reserved.

18 MR. NORFOLK: Thank you, your Honor.

19 MR. MUNRO: Thank you, your Honor.

20 THE COURT: Thank you.

21 (This matter adjourned at 4:57 PM.)

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CERTIFICATION:

I, THERESA J. CASAL, RPR, CRR, Official Court
Reporter in and for the United States District Court, Northern
District of New York, do hereby certify that I transcribed
the digitally-recorded hearing held in the heading hereof;
and that the foregoing is a true and correct transcript of
the same and the whole thereof, to the best of my ability.

THERESA J. CASAL, RPR, CRR
Official Court Reporter

DATE:

